Information and Privacy Commissioner/ Ontario

Access and Privacy in Canada Developments from September 2001 – August 2002

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Introduction

This report will summarize the main developments that have taken place with regard to access to information and privacy of personal information in all Canadian jurisdictions during the period of September 2001 – August 2002.

In Canada, there are two federal (Canadian) oversight regimes – one for access and one for privacy. There are also oversight regimes within each of the country's ten provinces and three territories. Broadly speaking, the two federal regimes have access and privacy responsibilities with regard to federal government departments and public bodies. Access to and privacy of the information held by other institutions, including local governments, is generally administered through the provincial or territorial regimes.

The exception is the power granted to the federal Privacy Commissioner, who, since the passage of the *Protection of Personal Information and Electronic Documents Act (PIPEDA)*, has oversight over cross-border and interprovincial exchange of personal information, as well as personal information held by federally-regulated businesses. As of 2004, this oversight will extend to all businesses in the private sector, except where provinces have their own legislation in place to cover privacy in this sector.

As a result, many provinces have recently passed or are starting to introduce their own private sector privacy laws. These laws have begun to interact with the access laws in each of the provinces, and have in some cases prompted provinces to pass access legislation where there was none before. While certain jurisdictional issues have yet to be tested, particularly with regard to the territories, a clear trend towards privacy is starting to be a factor in access circles across the country.

Canada (Federal) – Access

Legislative Developments

Public Sector

In June 2002, the 20-year review of the federal *Access to Information Act* took place. It was conducted by a special Access to Information Review Task Force, composed of appointed senior government officials and a body of outside advisors, rather than by a Standing Committee of the Parliament. After 18 months of evaluation, the Task Force released a report concluding that the *Act* itself is basically "sound", but is facing some systemic challenges to its implementation.

The report contained 139 recommendations, which focused on increasing the capacity of access officials to respond to requests and building a "culture of access" within the government and public service. These recommendations included a more user-friendly access request system, comprehensive training for access officers, routine release of documents rather than a "reactive" access structure, and improved resources, such as a "pool" of contract access professionals that could be used when demand for documents is high.

There were also some changes proposed to the legislation itself, including:

- the introduction of a set of "criteria" to determine what institutions should be governed by the Act;
- the routing of appealed Information Commissioner recommendations to Parliamentary review rather than judicial review;
- the appointment of a retired judge to handle an access complaint against the Information Commissioner whenever one arises;
- the creation of an exemption for notes made by public servants for their own use;
- the inclusion of Cabinet confidences in the Act (with protection by a mandatory class exemption);
- a clarification that would protect third party information concerning critical public infrastructure that is provided to the government;
- the introduction of a discretion for the head of a public body to refuse to disclose information that would endanger an individual's physical or mental health, safety and/or "human dignity";
- the addition of "consumer protection" as a factor to consider when determining if the third party information exemption can be used;
- the introduction of a discretion to allow the disclosure of reports-in-progress to be delayed until their completion (within reasonable time limits);

- the introduction of a discretion to refuse disclosure of records that could "damage or interfere with" cultural and heritage sites, including those sacred to aboriginal people;
- a requirement that access requests must refer to a specific subject matter or specific records;
- the introduction of a discretion to refuse to fulfill "frivolous, vexatious or abusive" requests;
- a raise of the general fees for access requests to $10, with the introduction of an hourly rate to be charged for non-commercial searches that exceed five hours of preparation time or 100 pages;
- the introduction of a provision allowing different departments to aggregate requests that come from the same requester or treat the same topic;
- the addition of a clause requiring institutions to make a "reasonable effort" to assist requesters with their search and offer them an opportunity to reformulate their request if it is considered "frivolous, vexatious or abusive";
- the addition of public and institutional education about the Act to the Information Commissioner's mandate;
- the addition of an Information Commissioner power to conduct assessments of institutional practices where they are having an effect on compliance with the Act;
- the introduction of a 90-day completion period for Information Commissioner investigations;
- the right of legal representation for witnesses testifying under oath;
- the extension of the Information Commissioner's duty to give notice to the head of any institution under investigation;
- a long-term move towards order-making powers for the Information Commissioner (who currently holds ombudsman-like powers).

The Information Commissioner, John Reid, released an initial statement in response to the report indicating his "disappointment" at the task force's focus on ease of access management for government departments rather than on ease of user access to the system. His statement also recommended that the task force report be turned over to a Parliamentary committee. The Information Commissioner will be issuing a detailed response to the report later in 2002.

An ad hoc group of backbench MP's also formed their own all-party Committee to review the access to information legislation, and released a report on their findings in November 2001, after five months of study. This report recommended that:

- a Parliamentary committee be established to review the task force findings;
- the Prime Minister issue a directive of effective access response to all departments;

- the *Act* be amended to require routine disclosure of documents after the passage of thirty years, and that this disclosure not be subject to the usual exemptions (except for an application for an exception that could be made to the Information Commissioner);
- on-line and Web media be increasingly used for dissemination of documents;
- the *Act* be amended to include all institutions that are publicly funded or controlled, established by Parliament, or which perform a public function (with the exception of the judiciary and the offices of senators and MPs). This would expand its scope to Crown corporations and other "emerging forms" of public enterprise, as well as the House of Commons, Senate and Library of Parliament;
- the section of the *Act* protecting confidentiality of cabinet records be repealed, and replaced by an injury-based exemption that could be invoked for a 15-year period;
- the sections of the *Act* protecting privileged documents and those pertaining to federal-provincial relations be narrowed in scope;
- the offices of the federal Privacy Commissioner and Information Commissioner be combined;
- the *Act* be reviewed by Parliament every five years.

None of these recommendations were incorporated into the Task Force report, with the exception of the recommendation to include the House of Commons, Senate and Parliamentary library in the scope of the *Act*.

In August 2002, Prime Minister Jean Chrétien announced that he was considering extending the *Act* to cover Crown corporations and would probably incorporate this proposal into the next Parliamentary session's Throne Speech or the introduction of an amendment bill.

Other

Anti-Terrorism Act

This *Act* was proclaimed in force on December 18, 2001, and permits the Attorney General to issue confidentiality certificates to exclude records from the *Access to Information Act* and terminate any related investigations by the Information Commissioner. These certificates can be issued at the Attorney General's discretion if in his or her opinion, there is a matter of public security involved.

Proceeds of Crime (Money Laundering) Act

This *Act* was amended and the amendments were proclaimed in force on June 14, 2001. The amendments broadened the powers of police investigators to seize documents where they "reasonable grounds" to believe that offences relating to money laundering and terrorist financing are being committed.

Significant Investigations

Definition of Personal Information

File 3100-1469/001

A representative of an employee association asked the National Research Council of Canada for information about individuals who received performance bonuses during the year 2000. The Council refused on the grounds that this qualified as "personal information" under the *Access to Information Act*. The Commissioner's investigation revealed that there were two types of bonuses given at the Council – one based on regular performance ratings, and another discretionary type that could be bestowed on individuals or teams by the senior managers and an internal awards committee. The Commissioner concluded that only the names of recipients of the first type of bonus constituted personal information, since their bonuses were more of an "entitlement." He recommended their release and the Council complied.

File 3100-13765/001

A lawyer representing a pilot's widow requested from the Transportation Safety Board both the tapes and transcripts of the mid-air collision that had killed the pilot. The Board responded that these constituted the personal information of pilots and air traffic controllers, and sought consent from other persons whose voices were on the tape for disclosure. Only one of them granted this consent, and so only the portions with this voice and that of the dead pilot on it were released. The Commissioner found that radio communications made over an open channel for the purpose of operating an aircraft did not constitute personal information, and recommended that the transcript of these communications be released. He then found that the flight tapes had been recorded with the possible purpose of disclosure in mind, for example in the event of an accident investigation, and therefore were not eligible for exemption under the federal *Privacy Act*. He recommended full disclosure, and the Board refused. The Commissioner has sought leave to appeal to the Federal Court.

Protection of Commercial Interests and Third Party Confidential Submissions

File 3100-13256/001

A researcher requested documents from Natural Resources Canada pertaining to a bid by Atomic Energy of Canada Limited (AECL) to sell nuclear reactors to Turkey. These documents included a critique of an environmental assessment prepared as part of the bid, and access to it was refused on the basis that it was information supplied by a third party in confidence, and disclosure of it would prejudice AECL's competitive position. During the investigation, it came to light that Turkey had in fact already decided not to purchase the reactor from AECL, and the document was then voluntarily released.

File 3100-15106/001

A requester involved in trying to track stolen vehicles asked Statistics Canada for information on how many vehicles in Canada are registered in more than one province. Statistics Canada refused on the basis that the provincial and territorial motor vehicle registration files had been provided in confidence. The requester argued that the information he was asking for was a statistical analysis prepared in reliance on those files, not the files themselves. The Commissioner agreed with the requester, and Statistics Canada reconsidered its stance and released the specific statistics the requester was seeking. The Commissioner emphasized in his recommendation that the exemptions for materials supplied by a third party in confidence cannot be extended to cover documents prepared in reliance on those materials.

File 3100-13546/001

A corporation requested a copy of the agreement between the Canada Customs and Revenue Agency and the Canada Post Corporation concerning the processing of international mail. The Agency disclosed portions of the agreement, but withheld the rest on the basis that the requester was acting on behalf of United Parcel Service (UPS), a competitor of the Canada Post Corporation. They alleged that the information was being sought to form part of an unfair competition challenge under Chapter 11 of the North American Free Trade Agreement (NAFTA). The requester said that since the *Customs Act* does not authorize the Agency to go to competitive tender for the delivery of international mail, UPS could not be considered a competitor of the Canada Post Corporation for this service. The Commissioner found that only the portions of the agreement dealing with how the Canada Post Corporation's financial compensation is calculated could be withheld, since knowledge of this could benefit a company interested in providing other services to the Agency. The parties accepted this conclusion.

Law Enforcement Exemptions

File 3100-15873/001

A television producer requested the records of the Royal Canadian Mounted Police (RCMP) about a 1985 visit by former American President Ronald Reagan to Québec City. The RCMP withheld the information on the basis that it related to lawful investigations and/or was information that could be used to facilitate the commission of an offence. The Commissioner's investigation revealed that the records had in actuality been transferred to the National Archives several years previously, and the RCMP had not reviewed them, as required by the *Access to Information Act*, before making its decision concerning disclosure. The Commissioner concluded that the records were now in the custody of the Archives and the request should be re-directed there. The RCMP refunded the requester's fee.

File 3100-14856/001

A request was made for copies of the policies and procedures manual used by officials of the Canada Customs and Revenue Agency to make a determination of non-resident and deemed-resident status for income tax calculations. The Agency disclosed portions of the manual, but withheld the rest on the grounds that it would interfere with enforcement of the *Income Tax Act*. The requester said that he could not adequately arrange his tax affairs if the actual procedures used by the Agency to evaluate his return were kept secret, and expressed concern that the "rules" were being left too much to the Agency's discretion. The Commissioner recommended that most of the manual be released, but allowed the exemption of the portions relating to income thresholds that guide the Agency's enforcement actions to stand.

Cabinet Confidences

File 3100-13828/001

The federal government's deputy ministers are entitled to a benefit known as the Special Retirement Allowance, which doubles ordinary pension entitlements for years of service to a maximum of ten years. A retired deputy minister who did not receive this allowance requested access to the Privy Council Office's entitlement requirements to find out why he had not qualified. The Office provided some general background information, but refused to disclose the exact guidelines for the allowance that the Treasury Board had approved several years previously, on the grounds that it was a Cabinet confidence. The Office's position is that its Clerk is the sole arbiter of what constitutes a Cabinet confidence, and any materials the Clerk certifies as such are exempt. The Commissioner found that in this case, the withheld document related to a publicly-announced Cabinet decision, and had even been shown to other individuals who were beneficiaries of the allowance upon request, and therefore it did not qualify as a Cabinet confidence. He added that even if it did, the previous sharing of this document had effectively waived any privilege attached to it, and he recommended that the Privy Council Office keep in mind its powers to waive Cabinet privilege for matters that concern the public interest. The Prime Minister refused to accept the Commissioner's recommendations or release the document. The Commissioner has sought leave to appeal to the Federal Court.

Fee Charges

File 3100-16210/001

A requester asked for copies of all classification and staffing requests processed by the Immigration and Refugee Board's human resources department between the beginning of 1998 and the middle of 2001. The Board informed the requester that the fee for processing this request would total $6,530, with $3,265 of it to be paid in advance as a deposit. The requester opined that fulfillment of the request would not take the projected 658 hours of search time because of the Board's electronic database. The Commissioner's investigation helped to clarify more precisely which documents the requester was seeking, and this led to a re-evaluation of the request search time that reduced it to 11 hours and a $60 fee.

File 3100-16426/001

An access researcher made a request to Human Resources Development Canada for certain data elements from its ATIPflow system, a database program used by many departments to track access requests. The software did not have the capacity to generate a report of the elements requested by the researcher, and therefore a manual search fee of $1,250 was assessed. The researcher telephoned the president of the company that produces ATIPflow, and negotiated an informal deal whereby the company would develop this capacity for the software and the requester would himself donate the $3,000 the implementation would cost out of his own pocket. However, the company later withdrew from the deal under what the requester alleged was pressure by Human Resources Development Canada, which argued that this software capacity was not needed for their day-to-day operational requirements and therefore there was no obligation for them to install it. Upon inquiry, the Commissioner found that there was a more convenient way to generate the information requested with the existing software, and this re-assessment reduced the request fee to $60, which the requester paid.

Court Decisions

Deference to the Commissioner's Findings/Ministerial Discretion to Refuse Disclosure

Canada (Information Commissioner) and TeleZone Inc. v. Canada (Minister of Industry)
2001 FCA 254, Court File Nos. A-824-99 and A-832-99

TeleZone requested information about Industry Canada's decision-making process in granting a license to provide wireless telephone services. The request was refused on the grounds that such information constituted "advice and recommendations" under the *Access to Information Act*. The Commissioner investigated and recommended disclosure of the majority of the information requested. Industry Canada released some of the information, but continued to withhold a document outlining how selection criteria were weighted. The Commissioner and TeleZone applied for a judicial review of the continuing refusal to disclose, but the application was dismissed by the Federal Court. They appealed that decision to the Federal Court of Appeal, which again dismissed the application, saying that Industry Canada's refusal to disclose the document was not an unlawful exercise of discretion.

While the Court upheld the ministerial discretion granted by statute, but found that the Commissioner is not owed deference by the courts. It opined that the courts can differ from the Commissioner on questions of both law and mixed law and fact, without having to find the Commissioner's conclusions unreasonable in order to do so. This judgement was given on August 29, 2001, and the Commissioner has since sought leave to appeal to the Supreme Court of Canada.

Canada (Information Commissioner) v. Canada (Industry Canada)

2001 FCA 253, Court File No. A-43-00

This was a companion suit to the one outlined above, involving some of the same requested documents. It established that the *Access to Information Act* requirement for a public body to provide reverse onus proof that it qualifies for an exemption from disclosing information does not apply to a Minister exercising his or her discretion to refuse disclosure. This decision was also handed down on August 29, 2001, and the Commissioner has again sought leave to appeal to the Supreme Court of Canada.

Deemed Refusals/Extension of Response Time Limits

Attorney General of Canada and Janice Cochrane v. Canada (Information Commissioner of Canada)

2002 FCT 136, Court File Nos. T-2276-00 and T-2358-00

A requester sought access to records related to the Immigrant Investor Program administered by Citizenship and Immigration Canada. Citizenship and Immigration Canada used a provision governing exceptionally large requests under the *Access to Information Act* in s. 9(1)(a) to extend the time limit for response to three years instead of the usual 30 days. In order to do this, all the requester's separate requests were grouped together and considered as one. Upon investigation, the Commissioner interpreted this invocation of s. 9(1)(a) as a deemed refusal to produce the records. He began a new investigation based on this interpretation, during which he issued an investigation-based order for production of the records. Citizenship and Immigration Canada challenged the Commissioner's interpretation in the Federal Court and won, with the court finding that even if s. 9(1)(a) had been improperly invoked, the Commissioner could not treat it as a deemed refusal. The court concluded that the Commissioner therefore had no jurisdiction to begin a new investigation or order disclosure of the related documents. The Commissioner has appealed this decision to the Federal Court of Appeal.

Definition of Personal Information

Canada (Information Commissioner) v. Canada (Canadian Cultural Property Export Review Board)

2001 FCT 1054, Court File No. T-785-00

A requester asked for records of a tax credit request made to the Canadian Cultural Property Export Review Board in connection with a donation of archives and memorabilia by Mel Lastman, the current mayor of Toronto. Although Mr. Lastman had already publicly disclosed the information in the records, the Board refused to provide the documents on the grounds that they contained personal information. The Commissioner recommended disclosure on the basis of the exception

to the personal information exemption in the *Access to Information Act* for information related to a discretionary benefit of a financial nature. The matter proceeded to the Federal Court, which upheld the Commissioner's finding. The Board appealed to the Federal Court of Appeal in October 2001 and also filed a motion for the stay of the previous court decision. The Federal Court of Appeal turned down the motion, and the Board released the records. The Commissioner has filed a motion requesting the dismissal of the appeal on the basis that it is now moot.

The Information Commissioner of Canada v. The Minister of Citizenship and Immigration and P. Pirie

A-326-01, FCA

Mr. Pirie requested access to the names of individuals who expressed opinions about him during a workplace administrative review under the section of the *Privacy Act* that states all opinions given about a person are part of that person's personal information, to which they have a right of access. The Commissioner takes the position that this personal information includes the names of the people giving the opinions. In May 2001, the Federal Court took the view that only the names of those who had a specific job responsibility to give opinions about Mr. Pirie may be released, and not the rest of the names. The Information Commissioner is currently appealing this decision, and the Privacy Commissioner, who has been granted intervenor status, has filed a memorandum supporting his position.

The Information Commissioner of Canada v. The Executive Director of the Canadian Transportation Accident Investigation and Safety Board

T-465-01, Federal Court Trial Division

The Information Commissioner has asked the Federal Court to order the Canadian Transportation Accident Investigation and Safety Board to disclose audiotapes and transcripts of an air crash to a journalist. The Board has taken the position that these tapes and transcript constitute personal information and is therefore withholding them from release. Nav Canada sought an order to be added to the case as a party affected, which was granted by the Federal Court. The Commissioner appealed this order, but the appeal was dismissed. The case is currently underway.

Privacy Exemptions

The Information Commissioner of Canada v. The Commissioner of the Royal Canadian Mounted Police and Privacy Commissioner of Canada

SCC 28601

The Royal Canadian Mounted Police (RCMP) invoked the privacy exemption in the *Access to Information Act* to refuse disclosure of a list of previous postings of RCMP officers to a requester. The Federal Court of Appeal upheld this decision, and the Commissioner sought leave to appeal to the Supreme Court of Canada. Leave was granted on September 13, 2001, and the case will be heard in the fall of 2002.

Cabinet Confidences

The Minister of Environment Canada v. The Information Commissioner of Canada and Ethyl Canada Inc.

A-233-01, FCA

The Minister of Environment had withheld certain information relating to a NAFTA unfair competition tribunal case from a requester on the grounds that it constituted a Cabinet confidence. The matter proceeded to Federal Court, where it was found that the refusal to disclose was an effort to circumvent the Parliamentary intention behind the *Access to Information Act* that background information used in a Cabinet decision be released once the decision is made. The Minister appealed this decision in April 2001.

Confidentiality and Commissioner Powers

The Information Commissioner of Canada v. Canada Post Corporation and Minister of Public Works and Government Services Canada and Peter Howard

A-489-01, FCA

A requester sought access to a report provided to Public Works and Government Services Canada by the Canada Post Corporation. The request was denied on the basis that the report was a Cabinet confidence. When the Commissioner began to investigate, the Minister of Public Works changed his stance and said some of the information would be disclosed, following the issuing of a notice to the Canada Post Corporation. The Corporation, upon receipt of the notice, filed with the Federal Court seeking to block disclosure, and a confidentiality order was issued covering the proceedings. This order was used as grounds to withhold some documents from the Commissioner during the course of his continuing investigation. The Commissioner issued a subpoena in response, and the Minister of Public Works filed a motion for variance of the confidentiality order to allow for compliance with the subpoena. The Commissioner argued against this, saying that the confidentiality order was not in conflict with a subpoena issued through his investigative powers under the *Access to Information Act*. In August 2001 the court agreed, but nonetheless issued a variance of the order to ensure compliance with the subpoena. The Commissioner is currently appealing this decision.

The Information Commissioner of Canada v. The Attorney General of Canada and Brigadier General Ross

T-656-01, T-814-01 and T-1714-01, Federal Court Trial Division

The Attorney General's office sought to refuse to provide certain information to the Commissioner in the course of an investigation on the grounds that it would be injurious to national defence and security. The office issued certificates protecting the information on this basis under powers granted by the *Canada Evidence Act*, which have since been altered by the passage and coming into force of the *Anti-Terrorism Act* in December 2001. While the Attorney General has powers to issue a new,

similar type of certificate under the new *Act*, he has not done so thus far. In the meantime, the Commissioner has filed an application with the Federal Court for judicial review of the issuing of the original certificates, seeking to quash them. A hearing date has not yet been set for these proceedings.

The Attorney General of Canada et al. v. The Information Commissioner of Canada

T-582-01, T-606-01, T-684-01, T-763-01, T-792-01, T-801-01, T-877-01, T-878-01, T-880-01, T-883-01, T-887-01, T-891-01, T-892-01, T-895-01, T-896-01, T-924-01, T-1047-01, T-1049-01, T-1083-01, T-1448-01, T-1909-01, T-1910-01, T-1254-01, T-1255-01, T-1640-00, T-1641-00, T-2070-01, Federal Court Trial Division

This case concerns the attempted consolidation of 27 applications for judicial review dealing with five separate legal issues. The applications were made by a range of parties, including the Attorney General and various witnesses who appeared before the Commissioner during investigations about records held in the office of the Prime Minister and several of his ministers. The applications seek declarations that:

1) The documents in question are not under the control of a government institution;

2) The Commissioner does not have the jurisdiction to issue certain confidentiality orders;

3) The Commissioner does not have the jurisdiction to photocopy certain subpoenaed documents;

4) The Commissioner may not require the production of records deemed to qualify for solicitor-client privilege;

5) The Commissioner may not ask certain questions during the course of his investigations.

The Commissioner opposed the motion to consolidate these various applications into one file, as well as the court's request that he produce transcripts of evidence confidentially given before him in private proceedings. In response, the court ordered the applications be split into seven groups, to be heard serially, and ordered the Commissioner to provide the confidential transcripts related to four of the seven groups in full (even though the applicants had identified only certain portions of the transcripts as relevant).

The Commissioner also concurrently brought a motion to (i) have the counsel of record removed from the case owing to a perceived conflict from their representing both the Crown and the witnesses at the same time and (ii) to have the Attorney General removed as an applicant on the grounds that she is a representative of the Crown rather than an "affected" or "necessary" party that has standing with regard to the applications. These motions were denied by the Court. The Court also found that the Attorney General could view the confidential transcripts in question, but only in accordance with the Commissioner's orders of confidentiality.

Powers and Procedures

The Commissioner announced in his 2001-2002 annual report that he will be publishing procedural guidelines for his Office's investigative process in the coming year. The guidelines will contain information on approaches usually taken with different types of complaints; the reasons for them and for any potential deviations from them; the roles, rights and obligations of witnesses and counsel involved in an investigation; and the nature and extent of the Commissioner's powers and at what points in the investigative process they may be used.

In his annual report, the Commissioner also focused on funding issues that are affecting the Office's efficiency. A backlog of 729 cases existed at the end of the 2001-2002 fiscal year, and the average time for completion of an investigation has risen to 7.8 months. The Commissioner wrote:

> Every conceivable productivity improvement has been introduced: conversion of management, policy, public affairs positions to investigator positions; introduction of a rigorous time-management system for investigations; improved training and work tools for investigators and greater reliance on computerized approaches to case management, precedents and report preparation. Independent consultants and officials of Treasury Board Secretariat have reviewed the office's utilization of its resources.
>
> There is agreement on this point: 25 investigators cannot handle expeditiously some 1,200 to 1,500 complaints per annum of increasing complexity, against in excess of 150 government institutions with offices spread across Canada and the world. Without additional investigators and without more rapid responses by departments to investigators' questions and requests, turnaround times and backlogs will not improve to an acceptable level. Parliament has been alerted to the difficulties being experienced by the Information Commissioner in obtaining the level of funding required from Treasury Board to meet his statutory workload.[1]

There were also changes in the management of non-investigative functions. The offices of the federal Information and Privacy Commissioners have traditionally operated using a shared corporate services structure to avoid duplication and save costs on finance, human resources, information technology and general administration. However, the Privacy Commissioner put an end to this arrangement during 2001-2002 and assembled a separate staff that reports to him, thus requiring the Information Commissioner to do likewise.

[1] *Annual Report Information Commissioner 2001-2002*. Information Commissioner of Canada. pp 33-34

External Factors

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The passage of the *Anti-Terrorism Act* and in particular the powers it gives the Attorney General to both remove various classes of records from coverage of the *Access to Information Act* and to terminate related investigations have been a source of great concern to the Commissioner's office during the 2001-2002 year. The Commissioner was vocal in his opposition to the passage of the new legislation, and devoted five pages of his annual report to an analysis of its provisions. As part of this analysis, he cited the findings of a recent government-commissioned study that the *Access to Information Act* poses no risk of the disclosure of sensitive intelligence information and that there have been no incidents of such disclosure during the life of the *Act*. He also stated that the powers to halt investigations will effectively result in a situation where the federal government may legally stop any independent review of denials of access at will, since the language around this provision did not explicitly tie these powers to the issuance of secrecy certificates.

Other

Traditionally, requesters under the *Act* have been able to obtain records about travel expenses incurred by prime ministers, ministerial staff, office holders and public servants. During 2001-2002, the government changed its policy and announced that it would no longer release this information in order to protect the privacy of the individuals involved. The government cited a 1997 Supreme Court of Canada decision (*Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403) in support of its stance, but no attempt to introduce a policy in line with that decision was made at the time that decision was released.

The new policy was triggered by requests for access to the Prime Minister's agenda books. All the ministers were asked by the Privy Council Office to cease routine disclosure of their agendas. Then all departments were informed that if the Commissioner sought access to any records held in ministers' offices, it was to be refused and the Privy Council Office was to be notified. Pressure was then successfully applied to the Treasury Board to reverse both its longstanding policy requiring disclosure of the expenses of ministers and their staffs and its policy on access to records held in ministers' offices.

In response, a handful of ministers said they would "consent" to the disclosure of these records in their departments nonetheless, although most refused. The resulting public controversy eventually caused a directive to be issued from the Prime Minister's office that all ministers give this newly-required "consent" for the release of expense records only. In the meantime, the Commissioner is proceeding with investigations into complaints from the original requesters seeking access to agendas and travel records.

In his annual report, the Commissioner also commented on what he felt was a general climate of increasing secrecy and hostility to access requests within the federal government. He cited two examples:

- The first concerned a case originally dating from 1997, where a requester who made access requests to the Privy Council Office and the federal department of Fisheries and Oceans received an "intimidating" letter from the Fisheries Minister in response, demanding to know if the requester was compiling a file on him and asking for copies of everything the requester had collected so far. The access requester complained to the Commissioner that someone had disclosed his identity to the Minister. When the Minister refused to disclose to the Commissioner who his source was, he was cited for contempt.

  The Minister tried to have the Commissioner's attempt to cite him declared unconstitutional, but the Federal Court upheld the Commissioner's right to proceed with the charges. The Minister in question then declared that he was willing to give information about his source, which turned out to be that the source was a media contact whose name he had forgotten. This assertion was contrary to the Commission investigation finding that senior sources in the Privy Council Office and the Fisheries department had disclosed the requester's identity. The Federal Court awarded punitive costs against the Minister in response. His legal costs were paid by the Privy Council Office.

- The second incident concerned a possible conflict of interest involving the former Finance Minister. Allegations were made in Parliament that the Minister's participation in Cabinet deliberations related to compensation for recipients of tainted blood in transfusions was improper, since he had been on the Board of Directors of a Crown corporation that owned a supplier of blood products and had potentially discussed with them how to react to the tainted blood controversy at Board meetings prior to his election to public office. In response, the Minister asked his department to search his records to find the Board of Directors' meeting minutes and release them publicly.

  The Parliamentary Ethics Counsellor also began an investigation and both he and several access requesters with various interests connected to the tainted blood scandal requested these same documents. The requesters were told that the records could not be located, but it later surfaced that the Minister's staff had indeed obtained copies from the Crown corporation and given them to the Ethics Counsellor only. Further copies were distributed amongst senior staff at the Ministry just after the date that most of the access requests had been made, although several subterfuges had been employed to avoid having to acknowledge their presence in the department to the access requesters.

  The Commissioner, whose investigation had brought much of this information to light, concluded that the Minister had not been involved in his staff's attempts to hide the records from the access requesters. He made recommendations for better training and procedures for handling access requests within the Ministry, as well as advising the Minister to initiate an independent audit of the Ministry's information management practices. The Minister accepted all of the Commissioner's recommendations.

Canada (Federal) – Privacy

Details on developments in this jurisdiction can be found in the 2001-2002 annual report of the Privacy Commissioner of Canada, a copy of which will be made available to you. The annual report will also be posted at the web site www.privcom.gc.ca.

British Columbia

Legislative Developments

Public Sector

Some "housekeeping" amendments made to British Columbia's *Freedom of Information and Protection of Privacy Act* came into force on April 11, 2002. The amendments allow the province's Information and Privacy Commissioner to delegate his order-making powers to other staff and to authorize a public body to ignore frivolous or vexatious requests at his discretion. In addition, the definition of "30 days" as the deadline for response to an information request under the *Act* has been re-defined to mean 30 working days. The amendments also require all provincial government ministries to perform a Privacy Impact Assessment (PIA) for all relevant policies, programs or legislation, and to deliver the results to the Corporate Privacy and Information Access Branch of the Ministry of Management Services, which administers the *Act*. (For more information, see ***Powers and Procedures***.)

In June 2001, the Premier instructed the Minister of Management Services to conduct an additional review of the *Act* to assess its performance and recommend further improvements. This review is still ongoing.

Private Sector

Initial preparations to introduce new legislation to govern privacy and access in the private sector are underway. Following a report to the legislative assembly by the Special Committee on Information Privacy in the Private Sector tabled in March 2001, the Ministry of Management Services released a consultation paper on "Privacy Protection in the Private Sector" in mid-2002. The paper indicated a preference for a general act, without sector-specific standards or extensive carve-outs, that focuses on covering organizations themselves rather than their activities.

There remain several outstanding issues which are expected to be worked out over the course of the drafting of the legislation, including: clarification of the definition of "consent", the allowable parameters of information-sharing between organizations, documentation of use requirements,

handling of costs, the definition of custody/control, who owns personal opinions about other people, whether there should be a frivolous/vexatious requests clause and information retention requirements, how to deal with disputed corrections and who should be the officer/body responsible for oversight of the act.

Significant Orders

Harm to Business Interests

Orders 01-20 and 01-21

The University of British Columbia and Capilano College released part of their exclusive sponsorship agreements with Coca-Cola to a student newspaper requesting the information, but withheld some of the documents on the grounds that it would harm the financial or economic interests of both the schools and Coca-Cola. The Commissioner ruled that the evidence to support this assertion was insufficient and that it did not meet the three-part test laid out in s. 21 of the Act for this exemption. The Commissioner ordered the remainder of the documents released.

Unreasonable Invasion of Personal Privacy

Order 02-23

The applicants obtained an arbitrator's award, under the *Residential Tenancy Act*, for rent and utilities owed by their former tenant. They asked the Ministry for her new address to collect the money owed under the award, but the Ministry refused under the exemptions governing disclosure that would unreasonably invade personal privacy. While it was found to be relevant that the address was supplied in confidence to the arbitrator, this was balanced with a fair determination of the applicants' legal rights. The Commissioner concluded that none of the exemptions under this section (s. 22(3)) were applicable in this case and the Ministry was not able to withhold the information on the basis of an unreasonable invasion of privacy.

Cabinet Confidences

Order 02-38

The applicant requested records relating to the decision of the Executive Committee to delay the imminent province-wide ban on smoking in public places. Records were withheld on the grounds that disclosure would reveal the substance of cabinet deliberations. The Commissioner found that most of the records were properly withheld, but also found that minutes of the Communities & Safety Committee were not protected as it was not an "Executive Council Committee" for the purposes of s. 12(1) of the *Act* governing cabinet and local body public confidences.

Conservation of Vulnerable Species

Order 01-52

Hunters are required to report grizzly bear kills to the Ministry of Water, Land and Air Protection under the *Wildlife Act* in order to provide information for the Ministry's conservation plans. Two conservation groups, one of which was based in England, requested information about the location of two of the grizzly bear kills reported. The Ministry provided some general information, but not details about the kill locations, on the grounds that it could interfere with conservation of a "vulnerable species." The Commissioner agreed that the bear is a vulnerable species, but not that the release of this information would be damaging to it. He ordered release of the documents; the Ministry has applied for judicial review.

Abuse of Access Request Process

Orders 01-03 and 01-16

The BC Lottery Corporation refused to release documents pertaining to its contract to use a well-known actor in its commercials. The previous Commissioner upheld its initial refusal, and then the requester applied for the documents again under the current Commissioner, who refused to deal with the case since it had already been argued once. He also made the same finding with regard to an applicant's re-request of certain documents held by Simon Fraser University, on the grounds that the Commissioner has the right under the Act to control any abuse of the review and inquiry process by applicants.

Fee Waivers and Charges

Order 01-24

A First Nations researcher sought a public interest fee waiver for an access request to the Ministry of Transport as part of research into a possible claim against the provincial government. The Commissioner upheld the Ministry's refusal to waive the fee, stating that the public interest exemption is not automatically activated if the requester is of or representing a First Nation. The records themselves have to relate to a matter of public interest in order for the fee waiver to be made.

Order 01-35

A community group requested information held by a government ministry on a logging company's proposals for timber cutting and road construction in a watershed in their locality, on the grounds that they were concerned about the effects on their water supply. The Commissioner ruled that the plans related to a matter of public interest, and should therefore be released, but that the ministry in question could refuse a fee waiver, since it had fulfilled many previous requests of this group without charge.

Order 02-31

The corporate applicant has been involved in litigation with the Hood Point Improvement District, for which Bowen Island is acting as Receiver. The applicant requested records relating to a specific construction tender process, which was the subject of the litigation against the District. The District estimated a fee of $3,500 and required the applicant to pay the entire amount before responding, on the basis that the applicant was a "commercial applicant". The Commissioner found that while the applicant was indeed a commercial applicant, Bowen Island itself could only charge the actual costs of the services listed in the FOI Regulation of the *Act*.

Investigations

The Commissioner conducted investigations into 81 privacy complaints in the 2001-2002 period, and found that 24 were substantiated. In addition, two were the subject of full-fledged investigation reports. The Commissioner summarized the most important investigations in his annual report, which was released on May 30, 2002:

- An employee who was on call in two health regions complained her privacy had been violated when one region disclosed her work hours to the other, in an attempt to ascertain if she had violated her employment agreement by cancelling her shift with them to take another one. The Commission found that this was an acceptable sharing of information, since it was "consistent with the purpose for which it was originally collected."

- A hospital worker complained that her privacy had been violated by a disclosure of her medical information and the inappropriate use of her medical chart for employment-related purposes. The information had been unexpectedly used by management to question her fitness for her job during a meeting where she had requested union representatives be present to protect her interests. Both the Commission and the hospital (in its own review) concluded that the disclosure of this information without preparation or consent in front of the union representatives was inappropriate, and the hospital apologized to the worker. The Commission recommended that any such disclosure in the future be discussed privately with the employee before being raised elsewhere.

- A government ministry employer disclosed an employee's embarrassing medical symptom in a letter to the employee's doctor, which was copied to several managers. The employer was involved in a long-running labour dispute connected to the employee, and stated that two of the three copied managers already had knowledge of the employee's symptoms, and that all of them needed to be kept up-to-date on developments in her case. The Commission recommended that the Ministry develop procedures for limiting the disclosure of medical information to staff dealing directly with an employee's claims and briefing senior staff on developments without disclosing confidential details. The ministry in question complied.

- There was a complaint about a ministry's casual handling of storage for student loan applications, including the staff's tendency to leave them out on desks at night without locking them away. The Commission found some of the concerns were justified and recommended better physical security and procedures to protect the documents. The ministry in question complied.

- A woman complained that a ministry employee inappropriately used the judicial system database to access information on her that was then shared with mutual acquaintances. The employee admitted to these actions, but her employer argued that they were mitigated by the fact that information relating to court proceedings is of a "public" nature and must be disclosed by the court in hard copy format upon request. The Commission found that, notwithstanding this fact, ministry employees should not be using the database to access information for which they have no operational need. The ministry in question conducted its own internal investigation, which came to the same conclusion, and reminded all its employees of the guidelines for the use and disclosure of personal information.

- The B.C. Nurses' Union complained about a series of contracts between TELUS and the Vancouver Hospital and Health Sciences Centre to provide an electronic medical records database system. The Union was concerned that the terms of the contract could allow inappropriate access to or use of information in the database. The Commission found that while some of the wording of the contracts could give rise to concern, the day-to-day security arrangements in place between the two parties provided proper safeguards for the information. The Commission recommended that future contracts of this kind include more explicit language, require contractors to comply with the *Act*, and provide for regular audits of the contractors' compliance. It also recommended that a Privacy Impact Assessment (PIA) be conducted as part of the contract negotiation process.

Court Decisions

Canadian Pacific Railway v. The Information and Privacy Commissioner et al [In The Matter of the *Judicial Review Procedure Act*]

2002 BCSC 603

This appeal arose out of an order in which an applicant requested information on contracts between Translink and the Canadian Pacific Railway (CPR). The decision was delegated by the Commissioner, and the Delegate who wrote the order decided that Translink should release the information. This prompted CPR to file an appeal in the BC Supreme Court. CPR argued that (i) the Commissioner was biased in that he had served as counsel for Translink, (ii) he could not delegate his order-making power, and (iii) that the Delegate erred in the interpretation of s. 21(1)(b) & (c) of the *Act*, governing exemptions for disclosures that would harm the business interests of a third party. The CPR's petition was dismissed by the Court, affirming both the Commissioner's power to delegate and the reasonableness of the Delegate's interpretation of the *Act*.

Powers and Procedures

At the request of the Commissioner, the Auditor General of British Columbia has agreed to review the financial statements and activities of the Commissioner's Office for the fiscal 2001-2002 year and report the results, which will be delivered to the Legislative Assembly.

The Office is undertaking a complete review and overhaul of its intake, mediation and inquiry procedures, in its first update since 1998. The terms of the review are to:

- Ensure policies and procedures are complete, up-to-date and understandable;
- Ensure requests for review mediations and complaint investigations are conducted in the most expeditious, fair and cost-efficient manner possible;
- Ensure that public guidelines with respect to the filing of a request for review and/or a complaint are clear, concise and accessible;
- Provide clear guidance for public bodies and applicants with respect to the mediation process;
- Ensure that the inquiry policies & procedures are necessary, clear, concise, understandable and accessible to public bodies and applicants;
- Rationalise all policies and procedures to ensure they are necessary in law and practice and are cost-efficient;
- Ensure that all cases are classified, opened and closed consistently and appropriately;
- Build in monitoring and quality assurance mechanisms to ensure compliance with standards articulated in policies, procedures and law.

The April 2002 amendments to the *Act* have also resulted in several procedural changes, since the Commissioner can now delegate his order-making power in access appeals under the *Act*. (He has delegated five orders so far.) The *Act* also now permits the Commissioner to refuse to hold an inquiry for an access appeal, thus allowing him to implement a fair, but more informal, method of disposing of frivolous appeals.

Papers and Submissions

On February 19, 2002, the Commissioner tabled the 2002-2005 Service Plan in the Legislature. The plan scans the operating environment of the Commissioner's office, sets out performance measures and targets, and provides a detailed budget breakdown for 2002-2003. Each year, the Commissioner's Office will report its success in meeting the planned targets and will revise the service plan as evolving circumstances require.

External Factors

Changes in Government and Budget

Under the Liberal government of Premier Gordon Campbell, sweeping budget cuts have been made to every department of the provincial government. In his 2001-2002 report, Commissioner David Loukidelis indicated that the Commission's funding was cut by 10% in the 2002-2003 fiscal year, and that to meet this cut he eliminated three staff positions and scaled back on rental space, legal services and a few other "important items."

While the Commissioner expressed confidence in his annual report that the Commission can function reasonably well after the first budget cut, he called on the Finance and Government Services Committee to reconsider planned additional cuts of 10% in 2003-2004 and 15% in 2004-2005, and expressed "grave concern" about the potential effect on response times to requests.

As a result of the budget cuts, the position of Executive Director was eliminated from the Commission's organizational chart. A review of the management structure is underway.

Other

In his 2001-2002 annual report, tabled in May 2002, the Commissioner commented on three key access and privacy issues: video surveillance by police agencies, delays in responding to access requests, and how to protect access and privacy rights when alternative mechanisms are increasingly being used to deliver public services.

The full report is available on-line at www.oipc.bc.ca/publications/annual_reports/Annual_Report2001-2002.pdf. Below are excerpts from the Commissioner's comments on these issues:

Video Surveillance by Police Agencies

It is often tempting in our society to look to technology for solutions to complex social problems. A lot of attention this year has been paid to a technology that I fear, for the most part, offers false promises, while carrying risks. I refer to routine use by police of video surveillance in public spaces, an approach to law enforcement that is increasingly under consideration by Canadian police forces. The police define their jobs in terms of crime prevention and public safety and, whenever possible, avail themselves of whatever tools are accessible in preventing crime and promoting public safety. My research in this area, however, leads unyieldingly to the conclusion the jury is still out with respect to the efficacy of video surveillance in the furtherance of these two objectives. The real impact these technologies have on our basic democratic rights, including our right to privacy, is often ignored, discounted, or rejected outright by many in the law enforcement community.

Delays in Responding to Access Requests

At the risk of being thought of – wrongly – as someone who cries wolf, I must again express concern about delays in responding to access requests. Some are struggling to respond in time, as required by the Act, due to inadequate resources.

Concern about adequate resources is heightened, of course, by the cuts in ministry budgets announced last year. Indications are that the access and privacy staff of most ministries will not be spared, even though ministries have a legal duty to respond in the time required by the Act. To the extent staff remain on the job, some will be bumped by more senior staff, who often will not have the necessary extensive training and experience in dealing with the Act. In combination, the reduced staffing levels, and inexperience of new staff, are likely to cause further delays and maybe affect the quality of decisions, in the latter case in the short term at least, in slaying the monster.

Alternative Service Delivery

The Act gives the public a right of access to records in the custody and control of public bodies. It also sets rules around the collection, use and disclosure of personal information collected by public bodies. Will the privacy and access rights of citizens be recognized and protected in the privatization of services formerly delivered by government? Providing government services through alternative service delivery raises special challenges to accountability, transparency and the protection of privacy...

...With respect to privacy protection, the government must ensure that all alternative service delivery mechanisms are structured, by statute or by contract, in such a way to ensure that British Columbians' personal information is appropriately handled by private sector service providers. In related initiatives, in October of last year, the OIPC published *Guidelines for the Audit of Personal Information Systems* containing personal information. In November of last year, we published *Guidelines for Data Services Contracts* that involve personal information. In the coming year we will continue to keep abreast of the privacy implications of alternative service delivery initiatives, including public private partnerships, and will comment on the privacy implications of such initiatives. We will also address the access to information implications of P3s and other alternative service delivery mechanisms, with a view to offering guidelines along the lines of those just described.

Alberta

Legislative Developments

Public Sector

The Alberta *Freedom of Information and Protection of Privacy Act* covers the government of Alberta, public bodies, educational bodies, public health care bodies and local governments. It came into effect in 1995, and is currently undergoing its statutorily-mandated review by the legislature. The ministry responsible for this *Act* is Alberta Government Services. The *Health Information Act*, which applies to custodians in the health care sector, was proclaimed and came into effect in early 2001. The ministry responsible for this *Act* is Alberta Health and Wellness. The province's Information and Privacy Commissioner has oversight responsibilities for both acts.

The proclamation of the *Health Information Act* was accompanied by two regulations. The *Health Information Regulation* covers a variety of issues, including designated custodians, security requirements, trans-border data flow requirements and fees for access to health information. This regulation provides definitions related to electronic consent and the means for holding health information in an electronic format. The *Designation Regulation* lists the research ethics committees and boards responsible for reviewing proposals for health research in the province. The possibility of an additional new regulation concerning the retention and disposition of health information has been under discussion in the province.

Fifteen Alberta statutes, mostly related to the health sector, were amended simultaneously with the proclamation of the *Health Information Act*. These included the *Hospitals Act*, *Mental Health Act*, *Public Health Act* and *Cancer Programs Act*. The confidentiality and privacy provisions in these statutes were repealed and amended to make them consistent with the new *Act*.

Private Sector

Privacy legislation governing the private sector may be introduced in Alberta, but no public process is currently underway. If no provincial legislation is passed, the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* will apply to commercial activities in Alberta as of 2004.

PIPEDA has already come into effect for cross-border transactions (in 2001) and personal health information (in 2002) in all Canadian jurisdictions. As a result, there have been some jurisdictional issues to resolve with respect to *PIPEDA*'s interaction with the Alberta *Health Information Act*. (See ***Jurisdictional Issues*** below.)

Significant Orders

Freedom of Information and Protection of Privacy Act

Custody and Control of Records

Order 2001-024

A requester asked the Town of Okotoks for records of town committees and minutes containing references to both the requester and an organization. The requester received some documents, but was told that those related to bylaw complaints and a special constable's letter were held by the local Royal Canadian Mounted Police (RCMP) detachment and were not in the Town's "custody and control", and therefore the Town could not release them. The letter was eventually found among the Town's own files and released to the requester. The Town also received a copy of the bylaw complaints from the RCMP detachment, which it provided to the requester in severed form before the Commissioner concluded his inquiry. The Commissioner found that the Town did have custody and control of these records, and expressed support of the Town's re-evaluation of its position.

Prosecutorial Discretion

Orders 2001-030 and 2001-031

These cases both dealt with access to records relating to prosecutorial discretion. In the first case, a requester applied to Alberta Justice for a copy of a Crown prosecutor's analysis of the requester's complaint against a former business partner. (This document had formed the basis of a decision not to proceed with a prosecution against that business partner.) Alberta Justice refused to disclose the document on the basis of its right to prosecutorial discretion under the *Freedom of Information and Protection of Privacy Act*. The Commissioner upheld this decision. The second case dealt with a requester's application to Alberta Justice for access to a report containing a prosecutor's reasons for withdrawing a charge of assault. Alberta Justice claimed the same exemption under the *Act*, and it was again upheld by the Commissioner.

Release of Personal Information/Statements Made During an Inquiry

Order 2001-032

This case involved a complaint that Alberta Human Resources and Employment had improperly released the complainant's personal information. The complainant had written letters to the Ministry and several other parties accusing the head of the Alberta Veterinary Medical Association of racist conduct and bias in the discharge of disciplinary powers. When the Minister began an inquiry into the accusations, the complainant accused the Ministry of disclosing the letters and his identity to two parties within the Association. The Ministry acknowledged that it had to disclose the substance of the allegations in order to investigate them, but it had not disclosed any personal information and had refused an access request for the complaint letters by the Association. The Commissioner's delegate found that personal information had not been released, and furthermore

that any information disclosed by the Ministry was covered by the exemption for statements made during the course of an inquiry. The conclusion was that statements made to the Commissioner in one proceeding under the *Freedom of Information and Protection of Privacy Act* cannot be used to fault a public body in a second proceeding under the *Act*.

Exclusions

Order 2001-029

Alberta Government Services refused to disclose the driving record of a third party to a requester. The Commissioner found that motor vehicle registry records are one of the classes of records that are not covered by the *Act* as provided by section 4, and that he therefore has no jurisdiction to order their release.

Order F2002-012

A mother sought to obtain a copy of her son's final English exam. The Calgary Roman Catholic Separate School Board claimed an exemption for exams as being explicitly excluded from coverage under the Act's section 4. The Commissioner agreed, and opined he had no jurisdiction to make an order in this case.

Abuse of Process

Section 55 Decision

In March 2002, the Commissioner issued a special decision authorizing both Alberta Municipal Affairs and the Town of Ponoka to disregard an access request on the grounds that a requester's repeated applications for the same information, which had been repeatedly responded to, constituted an abuse of process under the *Act*.

Fee Waivers

Adjudication Inquiry Between Alberta Justice, Hugh MacDonald, MLA, and the Globe and Mail

Under the regulations of the *Act*, institutions are allowed to require requesters to pay fees under certain circumstances. Two separate requests were made to Alberta Justice for records relating to the settlement of a defamation suit brought by an Alberta lawyer against several prominent people in the Alberta government and Stockwell Day, then-leader of the federal opposition Reform Party. The settlement costs were paid out of the publicly-funded provincial Risk Management and Insurance Fund. The separate requests for the records were made by a Member of the Alberta Legislative Assembly and a national newspaper.

Alberta Justice informed the requesters that there would be fees charged for their requests, in the amounts of $59,571 and $60,696 respectively. The requesters submitted that the public interest nature of the records requested entitled them to a fee waiver. The Commissioner recused himself from dealing with the matter on the grounds of a potential conflict of interest, and it was referred to an adjudicator appointed by the Lieutenant-Governor-in-Council. The adjudicator handed down a decision in May 2002 ordering that a full fee waiver was not appropriate, but a fee reduction

could be applied in this case. The amounts of the respective fees charged were reduced to $2,500 and $500.

Health Information Act

Practise Review Information

Order H2002-002

A requester made a complaint about a surgeon and then applied to the Calgary Health Region for access to correspondence about an internal review of that complaint. The custodian disclosed some information to the requester but withheld one letter. The *Health Information Act* says a custodian must refuse to disclose health information that sets out the results of an investigation, disciplinary proceeding, practice review or inspection relating to a health services provider. The custodian refused to disclose the letter on the grounds that this was practice review information, which is exempt from access under the *Act*. The Commissioner upheld the custodian's position.

Requester Access to Own Health Records

Order H2002-001

A requester sought access to his own patient record from the Alberta Mental Health Board, which included two involuntary hospital admissions at Alberta Hospital Edmonton. The Board refused, based on the exemptions for disclosures that could reasonably be expected to result in harm to the requester, threaten the health and safety of others and create a threat to the public. The Board also refused based on the exemptions for disclosure that would prejudice diagnostic tests or assessment, lead to identification of persons who provided information in confidence, and reveal health information of other individuals. While the Commissioner found that some of these grounds were justified to some extent, he ordered disclosure of all pages of the record with minimal portions severed.

Investigations

Investigation Report 2001-IR-009

A local television outlet reported the discovery of numerous physical therapy records strewn about a field near Edmonton. The records turned out to belong to a private clinic, Lake Beaumaris Physical Therapy Ltd. The Commissioner found that the clinic was subject to the *Health Information Act* as an "affiliate" through its agreement with the Capital Health Authority to provide services for the Community Rehabilitation Program of the province. The Commissioner conducted an investigation and determined that while proper policies and procedures for the disposal of records were lacking, the privacy breach incident was mostly the result of an isolated human error. The Commissioner recommended that proper policies and procedures be introduced, that the staff be provided with training concerning record disposal and the record subjects whose privacy had been breached be contacted and informed of the incident. The Commissioner also asked the College of Physical Therapists of Alberta to issue an advisory to physical therapists concerning their duty to dispose of records responsibly. The recommendations were accepted.

Audits

Staff from the Commissioner's office conducted numerous site visits during this period, involving a wide variety of private and public organizations that hold health information. In July 2002, the Commissioner's office launched its new website design. The site, at www.oipc.ab.ca, now hosts searchable registries for Privacy Impact Assessments accepted by the Commissioner and Research Ethics Reviews from all six designated Research Ethics Review Boards in Alberta.

Court Decisions

University of Alberta v. Pylypiuk

[2002] ABQB 22

A professor at the University of Alberta applied for all personal information about her held by the University with regard to a decision to remove her from a Ph.D. supervisory committee for graduate studies. The access application included a request for letters written by three graduate students and a former associate dean. The University refused to disclose some of the documents on the basis that this would constitute an unreasonable invasion of privacy, and that in particular the personal information of the students must be protected, along with their submissions on this matter, which constituted information provided by a third party in the expectation of privacy.

The Commissioner's investigation found that some of the records meshed the personal information of the students so closely with that of the professor that it could not be severed, and therefore those records must be withheld. However, the Commissioner did authorize the release of other records on the grounds on the basis of public scrutiny considerations. The University applied for judicial review of this portion of the decision. The court upheld the Commissioner's power to overturn the decision of the head of a public body, and also concluded that some degree of deference is owed to the decisions of the Commissioner by the courts. However, the Commissioner's decision was quashed, and the court found that the professor had not adequately met the burden of proof to establish that disclosure would not be an unreasonable invasion of privacy (and in particular to settle the question of whether disclosure would create a power imbalance between professor and students). The Order (2000-032) was remitted back to the Commissioner for re-consideration in March 2002.

Other

The *Health Information Act* received judicial consideration by the Alberta Court of Queen's Bench in the case of *Pozdzik (Next friend of) v. Wilson and Glenrose Rehabilitation Hospital*, 2002 ABQB 32, which was issued on January 11, 2002. The defendant's counsel wished, over the plaintiff's objections, to interview a physician who had been subpoenaed to give evidence for the plaintiff at trial. It was held that the counsel could proceed with the interview, with the physician's permission, since: "The treatment provided to the mother of the Plaintiff is the focus of the trial and privacy considerations of the doctor-patient relationship must yield to the extent of the litigation process. I do not find the *Act* makes any change in that principle." [para 3]

This litigation exemption had been recently narrowed in a decision rendered by the same Justice in *Stoodley v. Ferguson*, 2001 ABQB 227, released in March 2001. The plaintiff's counsel in this case provided copies of the medical records of various treating doctors to the defendant. The defendant's counsel had already spoken with two treating doctors, and wanted to interview the remaining ones. The plaintiff sought an order to obtain all notes and records of those interviews, and asked if the defendant was permitted to meet with any of the treating doctors, and if so on what terms. The key issues were the fiduciary obligation of the physicians and the right to confidentiality of a patient who puts his or her health at issue in a lawsuit.

The decision recognized a limited waiver of confidentiality for purposes of medical malpractice litigation, but only to the extent necessary for the litigation to proceed. The defendant's counsel was allowed to conduct the interviews, but with conditions, which included:

- The consent of the physicians to the interview;
- The presence of the plaintiff's counsel at the interview;
- The right of the plaintiff's counsel to object to questions involving confidential information not relevant to the matter at hand or any privileged information;
- The adjudication of any objections of the plaintiff's counsel before the physician may give an answer;
- Reliable recording of the interview.

The defendant also had to disclose all materials related to the interviews already conducted to the plaintiff.

Jurisdictional Issues

Federal/Provincial

The Commissioner's office issued notice in February 2002 of an investigation under the *Health Information Act* into the practices of pharmacies disclosing health service provider information to a company called IMS Canada Inc. for marketing purposes. The investigation included written submissions from interested parties and oral hearings, which have now been concluded.

This investigation was initiated in response to the September 2001 finding of the federal Privacy Commissioner under *PIPEDA* that disclosure of the prescribing patterns of doctors to IMS was professional information, not personal information, and therefore could be sold, across borders or otherwise. (This finding has been appealed to the Federal Court.) The report resulting from the Alberta investigation, which has not yet been released, is expected to provide interpretation of (a) the relationship between the provincial and federal legislation on personal health information and (b) the position of Alberta's acts with respect to trans-border data flows, which are currently governed by *PIPEDA* only.

In-Province

The relationship between the *Freedom of Information and Protection of Privacy Act* and the *Health Information Act* in the area of personal health information is still being interpreted. A predominant jurisdictional issue that has been coming up for consideration is whether a record contains personal information (governed by the first act), or health information (governed by the second).

Several decisions during this time period also established additional boundaries for the application of the *Freedom of Information and Protection of Privacy Act*. Chief among them were the Commissioner's findings that certain provisions of the *Municipal Government Act* concerning property assessment information are paramount (Order 2001-005), while certain provisions of the *Occupational Health and Safety Act* concerning investigation information are not (Order 2001-026).

Powers and Procedures

The positions of both Information and Privacy Commissioner and Ethics Commissioner were jointly held by the same person, Robert C. Clark, for several years. While these offices were formally separated as of September 1, 2001, the appointment of a new Information and Privacy Commissioner did not immediately take place. The Assistant Commissioner, Franklin J. Work QC, acted as the interim Information and Privacy Commissioner and was confirmed as the official appointee to the post by the legislative assembly in May 2002. Mr. Work was sworn into office on August 12, 2002.

Commissioner Work has delegated review/inquiry/order powers under the *Freedom of Information and Protection of Privacy Act* to a staff person who now holds the title of Adjudicator for the purpose of exercising the delegated powers.

Sectoral Trends

Some Alberta legislation that directly impacts health information privacy is currently under review, including the *Child Welfare Act*, *Protection for Persons in Care Act* and the *Ambulance Services Act*. Amendments to the *Public Health Act* were recently considered to expand the authority for public health officials to respond to emergencies involving communicable diseases ranging from the "Superbug" to the possibility of bioterrorism and security at the G-8 summit.

The various legislative provisions impacting the privacy of health information in Alberta are becoming increasingly affected by questions of provincial and international cross-border jurisdiction. The impact of federal legislation, such as the *DNA Identification Act* and the proposed *Assisted Human Reproduction Act*, upon provincial health sector privacy is an ongoing issue.

Another issue of concern is the increasing use of electronic technology, such as Telematics and e-health modalities, to document services and deliver health care. There are questions about how to appropriately protect the privacy of health information in this new context. For example, the "Mazankowski Report" that was released by the Premier's Advisory Council on Health in December 2001 recommends expediting the establishment of electronic health records and delivering more health services (and therefore the custody and control of related health information) by way of the private sector.

Saskatchewan

Legislative Developments

Public Sector

Saskatchewan's *Freedom of Information and Protection of Privacy Act* came into effect in 1992, and its *Local Authority Freedom of Information and Protection of Privacy Act*, specifically applying to local municipalities, came into effect a year later. The ministry that administers these acts is Saskatchewan Justice.

The province also has a *Health Information Protection Act*, which was passed by the legislature in 1999, but has not yet been proclaimed in force, in order to allow time for compliance preparation. When this *Act* does come into effect, it will apply to any body considered a "trustee" of personal health information in the province. The ministry responsible for its implementation is Saskatchewan Health.

Saskatchewan's Freedom of Information and Privacy Commissioner has oversight responsibilities for all three acts.

Private Sector

There does not yet appear to be a process in place to develop privacy legislation governing the private sector in Saskatchewan. If no provincial legislation is passed, the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* will apply in Saskatchewan as of 2004.

Significant Investigations and Reviews

Between April 1, 2001 and March 31, 2002, 42 requests for review were filed under the *Freedom of Information and Protection of Privacy Act*, and 6 were filed under the *Local Authority Freedom of Information and Protection of Privacy Act*. There were also 9 privacy complaints filed with the Commissioner's office as well. These numbers represented a 25% increase in the number of privacy investigations and a 54% increase in the number of requests for review over the previous fiscal year, in addition to an ongoing backlog of cases. Significant trends in these cases have not been reported by the Commissioner's office.

Court Decisions

Fogal v. Regina School Division No. 4

[2002] S.J. No. 141

A teacher at a local school board was given a performance review in response to a complaint from a parent. The teacher, on the advice of her union, made a request under the *Local Authority Freedom of Information and Protection of Privacy Act* for all correspondence related to the substance of the complaint, since she was unaware of its nature. The Board refused to release it, invoking the exemption for evaluative or opinion material that is provided in confidence and solely related to suitability and qualifications for employment. The Commissioner upheld this position, and the matter was appealed to the Saskatchewan Court of the Queen's Bench, where it was argued that this exemption should only apply to material that is part of an initial hiring process. The Court disagreed and determined that suitability for employment can be evaluated throughout one's tenure. It upheld the Commissioner's finding.

Powers and Procedures

An alternate Acting Freedom of Information and Privacy Commissioner, Franklin Alexander MacBean QC, was appointed by order-in-council in July 2001 specifically to handle all matters in which the Information and Privacy Commissioner found he had a conflict of interest. Five of the requests for review filed with the office were handled by the alternate Acting Commissioner between April 1, 2001 and March 31, 2002.

External Factors

Saskatchewan's Freedom of Information and Privacy Commissioner, Gerald L. Gerrand QC, resigned effective August 1, 2002, halfway through his five-year mandate. He publicly blamed his resignation on a lack of the resources needed to do his job properly. He had only a part-time secretary and the alternate Acting Commissioner to help him in his duties, and also had another role as the Saskatchewan legislature's Conflict of Interest Commissioner, which he will continue to fulfill.

The Commissioner's resignation took place against the background of several controversies in the province regarding the government's handling of personal information. Alleged mishandling of personal information by workers at the Social Services Department and two Crown corporations, SaskPower and Saskatchewan Government Insurance, is under investigation by the legislative assembly. Also, the RCMP has launched a joint police probe with Regina and Saskatoon city forces to investigate alleged breaches of confidentiality by an undisclosed number of police officers. The Commissioner had declined to conduct concurrent investigations of his own into these matters, citing once again the lack of resources.

A new interim Freedom of Information and Privacy Commissioner, Richard Rendek QC, was appointed effective August 1, 2002, until the end of the province's fiscal year in April 2003. Mr. Rendek has indicated he will decide whether to let his name stand for permanent appointment at the end of the interim period. The provincial Department of Justice has announced that it will pursue revisions of the amount of resources available to the Commissioner through the legislative assembly's Board of Internal Economy.

Manitoba

Legislative Developments

Public Sector

The Manitoba government is statutorily required to undertake a five-year review of both the provincial *Freedom of Information and Protection of Privacy Act (FIPPA)* and the *Personal Health Information Act (PHIA)*. The *FIPPA* review must be initiated by May 4, 2003, and the *PHIA* review by December 11, 2002. The internal processes to get the reviews underway have commenced.

Private Sector

There does not yet appear to be a process in place to develop privacy legislation governing the private sector in Manitoba. If no provincial legislation is passed, the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* will apply in Manitoba as of 2004.

Other

Regulations added to the *Manitoba Taxicab Act* effective July 1, 2002 require installation of security cameras in all taxis as a safety measure to protect drivers. In August 2002, the Ombudsman's office announced a review of the implementation of the new regulations. Its aim is to ensure the information provided by the cameras will be collected, used, disclosed, retained and disposed of in a manner consistent with *FIPPA*.

Investigations

The Ombudsman completed an investigation in November 2001 concerning an allegation that an employee of the Health Sciences Centre in Winnipeg had tampered with a patient's personal information and then sent out the altered record to friends and family of the patient. The allegations turned out to be mostly unsubstantiated, although the employee did apparently alter the patient's demographic information in the database as a joke between them.

The Ombudsman found that the Health Sciences Centre had taken adequate steps to address the issue once the allegation was made by conducting an internal review of the situation, changing back the records that had been altered, suspending the employee in question and eventually transferring her to another department where she would not have authorization to access medical records. The Centre also had an electronic monitoring system in place that was able to validate which records had been altered. The only omission he found was that the Centre had neglected to tell the complainant about the actions they had taken, although the Centre staff is considering a new set of reporting guidelines to remedy this.

Further information on the results of Manitoba investigations and reviews as they are reported is available at www.ombudsman.mb.ca/access.htm.

Court Decisions

R. v. Keith Mondesir
[unreported]

The Ombudsman's 2000 investigation of a local optometrist charged with violating *PHIA* by disclosing personal health information to a third party culminated in a guilty plea before the Provincial Court of Manitoba in May 2002. Two other counts of disclosure and sale of patient information were dropped.

Jurisdictional Issues

The Manitoba acts cover a range of institutions and are both overseen by the Ombudsman's office. *FIPPA* applies to public bodies, including provincial government departments and agencies, as well as to educational, health care and local government institutions. *PHIA* applies to health professionals, health care facilities, public bodies and health services agencies that collect or maintain personal health information, all collectively referred to as "trustees."

Where a body is not covered under the *Acts* in Manitoba, it may in some cases be caught by the *Ombudsman Act*, which governs complaints about the fairness of administration by government departments and agencies. The Ombudsman's office has handled several privacy and access cases in the past few years where an investigation was conducted under the *Ombudsman Act* instead, such as a case where a criminal pardoned by the National Parole Board found out his court records had been anonymously provided to his employer. The courts are not governed by the province's access and privacy legislation, so the Ombudsman exercised his alternate jurisdiction to make recommendations concerning information release procedures at the Court of Queen's Bench. Recommendations given under this *Act* are not able to be appealed.

Powers and Procedures

Privacy Impact Assessments

The Ombudsman's office is developing a template for conducting privacy impact assessments on new and existing programs. While a separate Privacy Assessment Review Committee (PARC) established by *FIPPA* is required to review all government initiatives that involve any bulk and volume disclosures or data linking and matching which is not otherwise authorized, there is currently no other formal procedure in place for comprehensive privacy audits of programs and proposed legislative schemes.

Internal Reorganization

The Ombudsman's office was re-organized into two units during 2001, one to deal solely with complaints and the other focused on compliance review activities, such as auditing, commenting and monitoring. However, this re-organization is effectively "on hold", due to the necessity of focusing resources on dealing with a continuing backlog of complaints. The number of complaints to the office has been rising steeply over the past few years, and the office is projecting 300 complaints for the coming year. Its total staff complement is currently only nine people, and as a result there are a significant number of complaints taking an average of 6 months past the time limits prescribed under the legislation to be concluded. (Extensions of the time limits are allowed under the Manitoba *Acts* as long as the office gives an anticipated date for completion.)

External Factors

Changes in Government

The Ombudsman, Barry E. Tuckett, released his Access and Privacy annual report for 2000 on April 24, 2002. The 2000 report was the first full-year report following the 1999 election of Premier Gary Doer's New Democratic Party government in Manitoba. The report discussed general trends, including what the Ombudsman called an "unprecedented" amount of complaints about government departments. He mentioned that there was an upswing during 2000 in incidents of the government denying information to the media (in particular ministerial briefing notes and travel expenses), invoking time extensions to delay releasing information, and changing internal procedures for the handling of access requests. The Ombudsman publicly questioned the government's commitment to *FIPPA* in the 2000 report, but noted that overall levels of compliance with the legislation were holding.

Changes in Budget

The Ombudsman's office is one of many departments and agencies that present its resource requirements to the legislative assembly's all-party Management Commission, which then advises the Cabinet on resource allocation. Widespread budget cuts have resulted in many departments taking significant reductions. Although the Ombudsman's office was not included in those cuts, it was required, along with other departments, to absorb incremental staff salary and benefit costs amounting to 3-4% of its 2002-2003 budget.

Ontario

Legislative Developments

Private Sector

The Ministry of Consumer and Business Services released a consultation draft of the proposed *Privacy of Personal Information Act* for public comment in early 2002. The draft *Act* would not only cover private sector use of personal information in general, it would also, in its current form, provide explicit provisions governing the use of personal health information.

The provincial Information and Privacy Commissioner, Ann Cavoukian, was among the parties who made submissions by the March 31, 2002 deadline for comments. In her submission, she lauded the government for putting together health-related provisions that are much stronger than those that were in the failed Bill 159, an earlier attempt to create a health information act in the province. The Commissioner made several recommendations focused on making it easier for users to exercise their rights under the draft *Act*, narrowing exemptions to consent, strengthening oversight arrangements and reducing the scope of the regulation-making power. She also suggested clarification of vague language in some of the draft's provisions.

The submission included an in-depth discussion of consent for the use of personal health information, with the Commissioner recommending a standardized notice and consent form for patients, as well as the incorporation of a "lock box" approach to consent that would allow patients to control the various levels of access others have to their information.

The Commissioner also examined the new powers proposed for the Commissioner's office under the draft *Act*, in particular suggesting that her office be granted the power to compel testimony, in line with several other provinces. She advised against the addition of a right of appeal to the Divisional Court, opining that organizations newly subject to the *Act* should be able to view the Commissioner's decisions as binding and final. She also objected to the draft *Act*'s provision specifying the number of Assistant Commissioners that must be appointed to deal with the new privacy oversight powers that would be gained with the *Act*, requesting the right to retain discretion in this regard.

The *Act* is currently being re-drafted to reflect consultation input of the Commissioner, over 600 other parties and the public. It is tentatively scheduled to be tabled in the Fall of 2002.

Public Sector

Both the provincial *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act*, which together govern the public sector in Ontario, were amended by the *Remedies for Organized Crime and Other Unlawful Activities Act*,

2001. This amendment gave the Attorney-General the power to refuse to either disclose or confirm/deny the existence of a record if it would interfere with proceedings he is conducting or enforcement of an order under the new *Act*. This amendment came into force on April 12, 2002.

Similar powers were also granted to the Attorney-General with regard to proceedings or orders under the new *Prohibiting Profits from Recounting Crimes Act*, which was passed on June 27, 2002. It will amend the *Acts* again once it comes into force on a date yet to be named.

Other

In addition to the core legislation, there were several new acts and amendments to other legislation passed in 2001-'02 that touched on access and privacy concerns. The most significant were:

Reliable Energy and Consumer Protection Act, 2002

This *Act* deals with Ontario's planned deregulation of its electricity market. It includes, among other items, a provision deeming documents relating to "market participants" to be "trade secrets" under the public sector acts if they are designated "confidential" by the Independent Market Operator. This *Act* also gives other classes of internal documents broad coverage under the "law enforcement" exemption. The Commissioner sent a letter to the Standing Committee on General Government with her objections, but the Bill was passed without incorporating her suggested changes and came into force on June 27, 2002.

Rescuing Children from Sexual Exploitation Act, 2002

This *Act* allows a police officer or Children's Aid worker to apprehend a child under 18 years of age without a warrant if there are grounds to believe the child is being sexually exploited for profit or is at risk of becoming so. The *Act* gives the province a right of profit recovery from the person exploiting the child, but it is possible that personal information might be disclosed about the child in the course of such proceedings. The Commissioner recommended that there be a provision in the *Act* for notice to the child and/or parents that such disclosure was about to occur. This recommendation was incorporated into the *Act*, although it did not go as far as giving either of these parties the right to challenge the disclosure. The *Act* was passed and came into force on June 27, 2002.

Food Safety and Quality Act, 2001

This *Act* introduced several provisions that opened access of law enforcement agencies to information about food safety risks to a degree that the Commission considered a derogation from the public sector *Acts*. Following a submission by the Commissioner, some of these provisions were modified, and a balancing test was added to determine whether the public interest overrides the duty to protect personal information contained in documents. The *Act* passed and came into force on December 5, 2001.

Health Protection and Promotion Act, 2001

This amendment to an existing *Act* allows a medical officer of health to make an order requiring a mandatory blood sample from a person if the applicant for the order has come into contact with a bodily substance of that person as a result of such things as being a crime victim or providing emergency health care services. The Commissioner objected to this amendment, but it was passed, and came into force on December 14, 2001. It received widespread media coverage, since a similar initiative at the federal level was defeated by the federal Privacy Commissioner's lobbying efforts at about the same time.

Significant Orders

Solicitor-Client Privilege

Order PO-1994

The requester sought access to a memo about court delays sent from a regional director of Crown operations to the Attorney-General. The Attorney-General claimed both the solicitor-client privilege and advice/recommendations exemptions. The privilege claim was rejected on the basis that the director was performing an operational role, as opposed to a legal role, but the Commissioner allowed the exemption for the portions of the record that contained advice. The Attorney-General has applied for judicial review of this order.

Order PO-2006

In this order the Commissioner found that the Office of the Children's Lawyer could not rely on either the solicitor-client privilege or the advice/recommendations exemption to withhold records from a child it represented in various litigation matters. It was found that the privilege exemption could not be sustained because the child was the client, or in the alternative, because the rationale for the exemption was not present in the unusual circumstances of this case (this was also the reason for the denial of the advice/recommendations exemption). The Attorney-General has applied for judicial review of this order on behalf of the Office of the Children's Lawyer.

Information Release Delays for Strategic Communications Reasons

Orders PO-1997/PO-1998

These two orders both deal with "contentious issues management" (CIM), a communications process that provincial ministries have started to employ in advance of document releases they expect to cause controversy. In one case, the Ministry of Northern Development and Mines was late releasing requested information about a golf tournament it sponsored, and claimed the delay was owing to consultation with third parties, but it turned out only one third party had been consulted.

The Commissioner pinpointed a CIM process as the actual source of the delay. In the second case, a requester who was encountering repeated delays in receiving information from the Ministry of Environment about a metal refinery's operations identified CIM as one of the reasons. The Commissioner ruled in both these instances that where CIM interferes with the timely processing of a request under the *Act*, the appropriate remedy is a full fee waiver.

Sharing of Representations Between Parties

Orders PO-2013/MO-1539

The Commissioner's office normally shares representations among parties, unless there is an overriding confidentiality concern. In both these cases, the institutions involved (the Ministry of Public Safety and Security and the Toronto District School Board) requested that certain portions of their representations be withheld from the appellant. The Commissioner refused both requests. The Toronto District School Board has applied for judicial review of the order in its case.

Interference with Future Commercial Transactions

Order PO-2019

In this case the Ministry of Finance withheld records relating to Ontario Power Generation's (OPG) lease of the Bruce nuclear generating station. The Ministry relied on the exemptions for Cabinet records, advice/recommendations, third party commercial information and valuable government information. The Commissioner upheld the Ministry's decision for most of the records affected. While it was found that there was a public interest in the disclosure of the records that might in other circumstances justify an override, it was also found that there was a significant public interest in non-disclosure of the records because they could interfere with future OPG transactions. Unlike other cases involving nuclear generating stations, the records here did not touch on health or safety issues.

Interpretation Of Exemption Involving "Advice Or Recommendations"

Order PO-2028

In this case the Ministry of Nortern Development and Mines withheld a portion of a record relating to a Northern Ontario Heritage Fund project. The Ministry relied on the exemption for advice or recommendations, and claimed that "advice" must be defined differently from "recommendation". The Commissioner did not accept the Ministry suggested interpretation for several reasons. In doing so, the Commissioner considered a number of factors including the long line of jurisprudence from the IPC/O that has been endorsed by the courts, the comparison and meaning of the English and French versions of the exemption, the consistency within the line of IPC orders considering this exemption, the purpose and legislative history of the section, the ordinary meaning of the word, and other case law. The Commissioner then reviewed the application of the exemption to the record at

issue. The Commissioner found that the section which set out "potential issues" merely draws matters of potential relevance to the attention of the decision-maker. Further, the sections listed as "options" did not accord with several IPC orders which suggest that it is not merely the listing of options, but the setting out of recommendations, or pros and cons with advice, or other advisory language which affects the context and provides "advice" out of "mere information". Finally, the disclosure of the severed portions was found to not be capable of allowing one to accurately infer any advice given.

Trade Secret and Compelling Public Interest – Municipal

Order MO-1564

This order involved Ontario's Municipal Property Assessment Corporation (MPAC) and a member of the public who wanted access to information that would help him ascertain whether his property had been properly evaluated in comparison to other similar properties in his geographic area. The Commissioner found that the market models developed by MPAC, when considered as a whole, constituted a trade secret which belonged to MPAC and has monetary value where disclosure of such information could reasonably be expected to prejudice MPAC's economic interests or its position in the competitive marketplace. Although some of the records at issue thereby qualified for exemption, disclosing the contents of some other records would not reveal the models themselves, so those records did not qualify for exemption. In addition, the Commissioner found that there was an inherent public interest in some level of transparency provided by MPAC through the disclosure of information sufficient to satisfy property owners that their assessments were made on the basis of sound and defensible criteria. This compelling public interest could be satisfied by disclosing most of the records or parts of records that did not qualify for the trade secret exemption.

Investigations

In December 2001, allegations were published in the *Globe and Mail*, a national daily newspaper, about the handling of personal information by the Chatham-Kent IT transition project, a pilot program of the province's Smart Systems for Health "ePhysician" network. It was alleged, among other things, that backup tapes with patient health data had been taken home by a technician and lost. The investigation found that the allegations were not accurate, and that adequate safeguards for patient data were in place.

The Commissioner did make some recommendations, including:

- That Smart Systems for Health look into and evaluate a range of privacy-enhancing technologies, including encryption, before expanding out from the pilot project.
- That a fact sheet about the pilot project be posted on the Family Health Networks Web site to provide information about it to the public.

Court Decisions

Exemption for Documents Where Government "Has an Interest"

Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)

[2001] O.J. No. 3223 (C.A.), 55 O.R. (3d) 355, 203 D.L.R. (4th) 538, reversing [2000] O.J. No. 1974 and Toronto Docs. 698/98 and 209/99 (Div Ct.), leave to appeal dismissed, S.C.C. 28853

In the late 1990s, the provincial government introduced labour reform legislation that exempted labour relations and employment-related records in which a provincial or municipal government institution "has an interest" from the access and privacy laws. The Commissioner has for several years interpreted this provision to refer to records in which the government "has a **legal** interest", and has furthermore required that this legal interest be current.

Three cases arose where the requested records related to matters that were no longer current:

1) a six-year old complaint against a police officer

2) a concluded job competition where no grievance was possible

3) a list of ranks and education levels of former police chiefs who had joined the provincial police as a result of municipal amalgamation

The Commissioner had found that there was no current legal interest and the normal rules of access would apply in each of these three cases. These cases were appealed to the Divisional Court, which upheld the Commissioner's position, then were joined together before the Court of Appeal, which overturned the decision in August 2001. The Court of Appeal opined that the government's interest need not be current or even legal. The Commissioner sought leave to appeal to the Supreme Court of Canada but this leave was refused in June 2002. The Commissioner has expressed concern that this decision potentially excludes a very wide range of records from access and privacy laws.

Litigation Privilege

Ontario (Attorney General) v. Big Canoe

[2001] O.J. No. 4876, 208 D.L.R. (4th) 327, Toronto Docs. 233/99, 132/00, and Consolidation No. 316/98 (Div. Ct.), leave to appeal granted (C.A.)

A family seeking insurance benefits related to the death of a relative was denied them on the basis that the death occurred while the deceased was engaged in criminal activity. The family requested access to documents that would clarify the circumstances under which he died from the office of the Crown counsel, which had prosecuted a now-concluded criminal case that generated the documents. The request was denied on the basis of the solicitor-client privilege exemption.

The Commissioner held that the Crown Counsel was subject to the rule that litigation privilege no longer protects documents collected for a lawyer's brief after the litigation has ended. She ordered disclosure of all documents that did not contain personal information or the Counsel's "opinion work product." The Divisional Court overturned this decision on appeal in 2001, stating that the files of Crown counsel are not expressly included in the category of documents to which this rule applies. The Commissioner sought and has received leave to appeal.

Privacy After Death

Public Guardian and Trustee v. David Goodis, Senior Adjudicator, and John Doe, Requester

(December 13, 2001), Toronto Doc. 490/00 (Div. Ct.), leave to appeal dismissed (C.A.)

This case involved a request by a professional heir tracer for personal information held by the Public Guardian and Trustee, i.e. the names of persons who died intestate, the date and place of death, and their last known address and occupation. The requester established that disclosure of this information would benefit unknown heirs who had not been located and who, but for disclosure, would have their estate entitlements revert to the Crown.

The Commissioner held that releasing this information would not constitute an unjustified invasion of privacy and ordered the disclosure. This order was appealed to the Divisional Court, which in December 2001 upheld the Commissioner's finding on the basis of two factors not explicitly mentioned in the legislation's exemptions – "diminished privacy interest after death" and "benefit to unknown heirs." The requester sought leave to appeal the court's decision, but it was denied in early 2002.

Is There a Difference Between Releasing Electronic Databases and Paper Records?

Phinjo Gombu v. Tom Mitchinson, Assistant Commissioner, and the City of Toronto

(May 10, 2002), [2002] O.J. No. 1776, Toronto Doc. 789/00 (Div. Ct.)

A local newspaper, the *Toronto Star*, requested from the City of Toronto the names, addresses and other personal information of contributors to candidates in a municipal election. The request was aimed at obtaining this information in the form of an electronic database kept by the City. The same information was available at the City Clerk's office as hard copies of financial returns, but this was a format the requester found less convenient for research purposes, and it also did not include telephone numbers.

The Commissioner found that the information could not be released in database format, on the grounds that disclosure of personal information in bulk electronic form is not expressly authorized by the *Acts*. The Commissioner held that disclosure of the database would constitute an unjustified invasion of privacy due to the potential for mass dissemination of its information on the internet, merging, matching and profiling, as well as the risk of identity theft, stalking, consumer profiling and unsolicited direct marketing. These risks do not exist to the same degree when the information is in handed over in hard copy format.

The Commissioner's Order was appealed to the Divisional Court, which overturned it in May 2002 and ordered that the City release the database. In turn, the Commissioner was granted leave to appeal to Court of Appeal for Ontario on September 3, 2002.

Powers and Procedures

The Commissioner's office released some revisions to its Code of Procedure in April 2002, including a new process for dealing with single-issue fee appeals.

Recommendations

In her 2001-2002 annual report, released in June 2002, the Commissioner made three recommendations to the provincial government:

- That it continue to move quickly to develop its draft private sector act;
- That it initiate a public consultation process to explore amendments to the provincial and municipal *Acts* that would govern the use of public registries in electronic format;[2]
- That it appoint a Chief Privacy Officer to help it design and structure government systems for handling personal information.

Papers and Backgrounders

The Commission released several papers and backgrounders on topics of interest in 2001-2002, covering both privacy and security issues for a range of audiences. These included:

- ***Opening the Window to Government: How e-RD/AD Promotes Transparency, Accountability and Good Governance***, June 2002 – An outline of how governments can use electronic Routine Disclosure and Active Dissemination techniques to further the goals of open government.

[2] The Commissioner has spoken on several occasions regarding how having use of a database and the ability to cross-reference information is very different from having access to a single hard copy of targeted information.

- ***Security Technologies Enabling Privacy (STEPs): Time for a Paradigm Shift***, June 2002 – Information on how security technologies can be redesigned to minimize or eliminate privacy-invasive features.
- ***Exercising Discretion under Section 38(b) of the Municipal Freedom of Information and Protection of Privacy Act***, January 2002 – A paper jointly co-authored with the Toronto Police Services about what constitutes a valid exercise of discretion when reviewing documents for release and possible disclosure.
- ***Backgrounder for Senior Managers and Information and Privacy Co-ordinators: Raising the profile of Access and Privacy in your institution***, December 2001 – A document jointly produced with the provincial Ministry of Natural Resources.
- ***Guidelines for Using Video Surveillance Cameras in Public Places***, October 2001 – A document designed to assist institutions in assessing whether a video surveillance system is necessary.
- ***Processing Voluminous Requests***, September 2002. This paper was jointly co-authored with the Ministry of Natural Resources, in order to provide some strategies to assist institutions in processing voluminous requests.

The Commissioner additionally recommended that public bodies governed under the *Acts* consult the Commission's guidelines on the use of video surveillance, and advise her office if they are thinking of initiating any program along these lines so that she can assist in evaluating it.

Sectoral Trends

Since legislation for the private sector is pending in Ontario, the Commissioner's office has been working to provide advice and assistance to organizations in this sector that are preparing for compliance. To this end, the Commissioner's office released a free Privacy Diagnostic Tool (PDT) in late August 2001, which was developed in conjunction with Guardent and Pricewaterhouse Coopers. The PDT helps businesses to evaluate their information policies and practices against the CSA standard.

In August 2002, the Commissioner's office also posted a "Frequently Asked Questions" area on its Web site (www.ipc.on.ca/english/whatsnew/newleg/faqleg-e.htm) to provide basic information to the general public and interested parties about the incoming legislation. This FAQ will be updated as changes to the draft legislation are released.

External Factors

9/11

In the aftermath of 9/11, the government announced in October 2001 that it would spend $9.5 million on new counter-terrorism initiatives and $12 million on an emergency preparedness strategy. It then added another $9 million to this budget a week after its initial announcement. The expenditures will include:

- $2.5 million a year, as well as a special one-time amount of $1.4 million, to improve the intelligence-gathering capabilities of Criminal Intelligence Service Ontario;
- $1 million per year and 8 new officers to expand the mandate of the new provincial Repeat Offender Parole Enforcement squad to include targeting individuals who are illegally in the province;
- $600,000 to develop specialized capacities at the Centre for Forensic Sciences, including DNA testing on a larger scale than previously carried out.

The government also passed the *Vital Statistics Statute Law Amendment Act* to increase the security of vital documents such as birth certificates. The amendments were given Royal Assent in the legislature on December 5, 2001. They increase the flexibility of the Registrar-General to alter registration procedures, and bestow greater discretion to be able to collect and disclose information for verification purposes or investigation of possible improprieties.

In July 2002, the government created the new post of Commissioner of Public Security and appointed the Assistant Deputy Minister of Public Security, James Young, to fill it. The new appointee will continue to keep his ministerial position, as well as his other job as Chief Coroner of the province.

The government also introduced Bill 148, a proposed *Emergency Readiness Act, 2002*, which would give the Lieutenant-Governor the power to "temporarily suspend" the operation of a provincial statute, regulation, rule, bylaw or order to facilitate assisting the victims of an emergency or to help the general public "deal with an emergency and its aftermath." The Bill went through a second reading in the legislature as of June 27, 2002 and has been referred to the Standing Committee on General Government for review.

The Commissioner also sent letters to federal officials regarding federal anti-terrorism legislation that was proposed following 9/11. The original anti-terrorism bill, Bill C-36, generated much controversy. The Commissioner's chief concerns regarding the original Bill were its expansion of surveillance capabilities, reduction of independent oversight, and the absence of a sunset clause for the legislation. A modified bill was eventually introduced and passed.

Another follow-up bill, the proposed *Public Safety Act*, contains fewer items of concern to the Commission. However, an outstanding issue remains the powers the Bill would give law enforcement officials to peruse airplane passenger manifests at will.

Events

The Commissioner's office continued to jointly host the 2nd Annual Privacy and Security Workshop at the University of Waterloo Center for Applied Cryptographic Research's 8th Information Security Workshop on November 1-2, 2001. The Commissioner delivered a keynote address on striking a balance between privacy and security.

The office also, along with several federal and provincial government departments, acted as a partner in presenting the Communications Security Establishment's 14th Annual Canadian Information Technology Security Symposium from May 13-17, 2002 in Ottawa.

The IPC has a popular school program for Grade 5 teachers, which complements the Social Studies unit on *Aspects of Government*, and a guide for Grade 10 teachers, to use with the new *Civics* program.

Finally, the Commissioner's office continues its program *Reaching Out To Ontario* where a team from the IPC/O visits selected communities to discuss access and privacy issues directly with Ontarians. The IPC staff meet with media representatives, such as the editorial board of the local newspaper and radio call-in talk shows. Presentations are made at local schools, universities or colleges, boards of trade, and the local library.

Québec

Legislative Developments

Public Sector

The oversight body for access and privacy in Québec, the Commission d'accès à l'information du Québec, is currently seeking public input as part of its mandatory five-year review of *An Act respecting access to documents held by public bodies and the protection of personal information*. This public sector legislation originally came into force in 1982 and has been reviewed at five-year intervals ever since. The guidelines on the Commission web site (available at www.cai.gouv.qc.ca/eng/cai_en/ cai_loi_opinion_en.htm) note that for the 2002 review, the Commission is seeking input on four particular themes:

- Whether automatic routine disclosure should be introduced for government documents;
- Whether departments and public bodies should have dedicated access staff with a degree of independence from management to respond to requests;
- Whether the *Act* should be extended to cover other bodies such as Crown corporations;
- If existing access laws provide an effective means of allowing citizens to participate in policy-making debates.

The Commission also initiated a series of hearings in April 2002 to get public feedback on the limits that should apply to the collection of genealogical information, and has stated that it will include the results of this process in its five-year review as well.

Once the Commission has put together a review report, which must be tabled in the Québec legislature no later than October 2002, then the legislature will immediately appoint a committee to study the report and initiate more formal public consultations. At the end of this process, which may take up to a year, the committee will make any recommendations for amendments to the act that result from the consultation.

Private Sector

Québec was the first province in Canada to pass privacy legislation covering the private sector, bringing into force *An Act respecting the protection of personal information in the private sector* in 1994. This legislation has occasionally been amended since its initial introduction, and a new amendment was passed in December 2001. This amendment allows the Commission to authorize disclosure of personal information about professionals without their consent, provided it is about their professional activities only, and the professional's identity is not revealed or their privacy otherwise invaded. The amendment also requires that the professionals be periodically informed about the types of uses to which this information is being put and given an opportunity to opt out

if they wish. The Commission is required to release an annual list of parties authorized to collect this kind of information.

This amendment was passed in response to the September 2001 finding of the federal Privacy Commissioner in the IMS Health case that the information resulting from physician prescriptions was "professional information" related to a work product and not personal information about a physician. This federal jurisdiction finding has been appealed to the Federal Court for judicial review.

Other

Health Card Draft Bill

In December 2001, a draft bill was tabled in the legislature to introduce a user "smart card" for the Québec health care system. This card would require a personal identification number (PIN) to be issued to every citizen of the province. Public hearings on the draft bill followed, and in March 2002, the President of the Commission, Jennifer Stoddart, presented a submission to the legislative committee. She stated that she felt the draft bill is "premature", and proposed that both a large-scale pilot study and a review of the legal framework that would be affected by the introduction of smart cards be undertaken before the process for passing the bill goes any further. The Commission had released an analysis of the implications of electronic administration of the health care system, called the *Study of the Health Information Highway in Québec: Technical, Ethical and Legal Issues*, in October 2001. Since then, it has repeatedly expressed concern about the extent of centralization of electronic patient data that will result from introducing innovations such as smart cards into the health care system.

An Act to amend the act respecting childcare centres and childcare services, 2002

In May 2002, the Commission released a public statement expressing concern about proposed amendments that would allow police to communicate previous accusations made against anyone applying for a permit to provide child care even if they did not result in a criminal conviction, and also significantly broadened the grounds on which an investigation could be initiated against such a person. However, the amendments passed and came into force in June 2002.

Significant Orders

Collection of Social Insurance Numbers from Prospective Tenants

Michel St-Pierre c. Ginette Demers Dion, File No. PV 01 06 28

A man whose application to rent an apartment was refused because he would not provide his social insurance number filed a complaint with the Commission. The prospective landlady pulled back from requiring this information on her rental applications, and stated it could be given on an optional basis. In April 2002, the Commission found that the landlady could not ask for it on either an optional or a compulsory basis, nor could she keep any social insurance number information she had collected so far.

Third Party Personal Information / Law Enforcement Investigations

X. c. Municipality of Saint-Eustache, File No. 01 09 14

A mother of two children had made a complaint to the police of Saint-Eustache alleging that her ex-husband, the children's father, had assaulted the children during a parental visit. As part of the ensuing investigation, the police interviewed the children on videotape. The investigation was closed following a decision that there was not enough evidence to bring a case, but the authorities sent a notice to the Youth Protection authorities in the area where the father lives and elected to keep the file in their records in case it needed to be re-opened. The mother filed an access request for the videotapes, since she wished to have more information about what her children had experienced. The police refused on the basis that the tapes contained personal information about third parties (both the children and the father) and were part of a law enforcement investigation. In March 2002, the Commission released a finding in support of the police's position and ordered that the tapes remain confidential.

Custody and Control / Information Provided In Confidence by a Third Party

Randi Lockeberg c. Municipality of La Pêche, File 99 19 08

The owners of a large property in the municipality were concerned that construction on the plots of land of two neighbours were encroaching on their property and were in violation of local building regulations. One of the owners filed for information about the permits and documentation relating to the construction activities. The municipality provided some information, but with photos of a new deck blacked out on the grounds that these constituted personal information. It also withheld the report of an inspector concerning the building of a septic tank on the grounds that the inspector had been hired by one of the neighbours and the document therefore did not belong to the municipality. Finally, it withheld the municipal inspector's plan for the neighbouring property on the grounds that it contained information provided in confidence by a third party. On March 14, 2002, the Commission released a decision finding that (a) the photos contained no humans or information different from what a passer-by would see and were therefore not personal information, (b) the report of the neighbour's inspector had been submitted as a supporting document with the neighbour's permit application, which therefore brought it into the public domain and (c) the municipal inspector had been retained by the municipality to ensure the development conformed with existing regulations and therefore his plan was also a public document. The Commission ordered the release of all three documents.

Paramountcy of Other Statutes

Deborah Watt c. MRC des collines de l'Outaouais, File No. 01 06 35

A local property owner applied to the MRC des collines de l'Outaouais for all the information that formed the basis of the calculation of the real estate assessment roll in the municipality of Chelsea. The municipality determined that this information came under provisions of the *Act respecting municipal taxation* that exempt the assessment roll from the access legislation. These provisions declare that all documentation submitted to create the assessment roll belongs to the property owner who submitted it, and all owners may only access information about their own property. On September 6, 2001, the Commission upheld the municipality's decision, and reminded the requesting owner that she was at liberty to go and examine the assessment for her own property if she wished.

Ross Smith c. Public Protector, File No. 00 10 61

A requester asked the Public Protector for a full copy of his file and all correspondence he had exchanged with the Protector's office. The Protector's office released all information on file except for some working notes made by the Québec Ombudsman and a fax cover sheet note. These were withheld on the grounds that the Ombudsman's investigations are confidential and exempt from access legislation under a specific provision of the *Public Protector Act*. While the Commission indicated it would hear the case, the requester did not submit the documents required for a hearing by the stated deadline, which had already been postponed once at his request. The Commission exercised its discretion to refuse to investigate further under the bad faith/frivolous requests provision of the *Act respecting access to documents held by public bodies and the protection of personal information*.

Investigations and Audits

June 17, 2002

The Commission audited the access response procedures of the Ministère de la Santé et des Services Sociaux twice during the 2001-02 period. The audits occurred in connection with a request for investigation by a member of the legislature who was having problems obtaining access to documents held by the Ministère. The Commission found evidence that the staff person in charge of access within the Ministère was making independent decisions about whether particular documents met the request requirements or should be disclosed, in a manner that was inappropriate and inconsistent with the *Act respecting access to documents held by public bodies and the protection of personal information*. The Commission recommended standardization of access procedures throughout the Ministère, and changes to the role of the staff person charged with responding to access requests.

April 5, 2002

In November 2001, allegations were made that personal information of election workers, including their social insurance numbers and birth dates, had been released to political parties and independent candidates during the Québec City municipal election. The Commission conducted an investigation and found a "lack of concern" for the protection of personal information and a "lack of respect" for the *Act respecting access to documents held by public bodies and the protection of personal information* had resulted in problematic handling of the information.[3]

Court Decisions

Are Crown Corporations "Public Bodies"?

Pouliot c. Hydro-Québec International Inc.

[2002] J.Q. no 2623

On July 23, 2002, the Court of Appeal of Québec released a decision that Crown corporations and their subsidiaries are subject to access legislation. The case involved a journalist from the daily newspaper *Le Soleil*, who was refused access to documents held by Hydro-Québec, on the grounds that the power company was a Crown corporation and therefore not a public body subject to the *Act respecting access to documents held by public bodies and the protection of personal information*. The journalist went to the Commission, which held that Hydro-Québec, and other Crown corporations, are subject to the legislation. Hydro-Québec appealed this holding before the Court of Québec and won in 1999. That decision was then appealed to the Superior Court, which refused to review it for jurisdictional reasons, and then went to the Court of Appeal, which has upheld the Commission's position. The ongoing review of the Québec legislation is expected to incorporate this new development.

Deference Due to the Commission

Loto-Québec c. Moore

No. 500-09-008231-995 Cour d'Appel, Province de Québec, Greffe de Montréal

A journalist for the *Gazette* newspaper requested access to contracts between Loto-Québec and the non-profit organizations that operate the stands for the sale of lottery tickets. Loto-Québec refused on the grounds that this would interfere with ongoing negotiations and provide a competitive advantage to third parties. The journalist complained to the Commission, which ordered Loto-Québec to release the documents. Loto-Québec then appealed for a judicial review, and the court ruled in its favour. This decision was appealed in turn to the Québec Court of Appeal, which found that the lower court judge had erred in overturning the Commissioner on a mixed question of law and fact. (In Québec, the Commission's decisions may be overturned by a court on a question of law

[3] Press release – "The Commission d'accès à l'information in action". April 5, 2002. www.cai.gouv.qc.ca/eng/actualite_en/act_com_en.htm

only.) On May 28, 2002, the Court of Appeal reinstated the Commission's order for Loto-Québec to disclose the documents.

Publicly-Available Information/Requests for New Compilations of Existing Materials

Fédération de la santé et des services sociaux c. Procureur général du Québec

No. 500-02-094164-014 Cour du Québec, District de Montréal, Localité de Montréal, Chambre civile

A representative of the Fédération de la santé et des services sociaux, a union for provincial health care workers, requested from the Procureur général du Québec the source materials that had been used to calculate statistics concerning employees in this sector. The Procureur refused, and the Commission upheld this refusal on the grounds that it would involve releasing the personal information of employees. It allowed some of the material to be released, provided it was severed from details that allowed the identification of the employees in question. The Fédération took this decision to judicial review on the grounds that this information was about public sector employees and was therefore required to be publicly available. On February 7, 2002, the court upheld the Commission's finding, and ordered that only the severed information could be released.

Gyulai c. Montréal (Ville)

No. 500-02-097005-016 Cour du Québec, District de Montréal, Localité de Montréal, Chambre civile

A requester asked the City of Montréal to disclose documents relating to a breakdown of amounts received by recipients of the city's residential sector subsidies for such activities as renovation, demolition and construction. The City refused to disclose the information requested, on the grounds that it would require them to generate a special set of calculations and comparisons that it did not otherwise perform with the data in the course of day-to-day business. The Commission upheld the City's position, but on the grounds that the names and addresses attached to this information constituted personal information that could not be released. The Court overturned the Commission's decision on May 15, 2002, finding that the presence of this information in public records met the conditions of the exception for publicly-available information.

Solicitor-Client Privilege

Ministère de la justice c. Neculai Broasca

No. 200-02-027507-013 Cour du Québec, District de Québec, Chambre civile

A man attempting to appeal a summary conviction based his argument for an appeal on the contention that the trial court came to its conclusions on the basis of evidence from the man's wife that was wrongly admitted, and without considering important evidence that had not been before the judge at the time of trial. Both the Superior Court and the Court of Appeal dismissed the appeal. During the course of these proceedings, the man made a request to the Ministère de la Justice for internal reports relating to his case. The Ministère refused on the grounds of solicitor-client

privilege. The Commission, upon examining the reports, opined that certain pages contained only straight facts well-known to all parties and could be released. This decision was appealed to the Québec Court, which found on April 8, 2002 that the pages in question did fall within the solicitor-client privilege exemption. This exemption is laid out in s. 31 of the *Act respecting access to documents held by public bodies and the protection of personal information* as pertaining to "a legal opinion concerning the application of the law to a particular case." The court opined that the recital of facts was a necessary component of establishing that this opinion related to a "particular case" and therefore was covered by the exemption.

Jurisdiction

Centre d'accueil Lasalle c. Syndicat canadien de la Fonction publique, section locale 2869

No. 500-02-075998-992 Cour du Québec, District de Montréal, Localité de Montréal, Chambre civile

This case related to a request from the head of the Syndicat canadien de la Fonction publique, a public service union, to see documentation related to the hiring of independent contractors by the Centre d'accueil Lasalle. The Centre refused to provide the documents on the grounds that the provisions of its contracts relate its collective agreements and therefore any matters concerning them come under the jurisdiction of a labour arbitrator rather than the Commission. A preliminary decision by the Commission opined that the documents in question comprised more than just ones that were connected to collective agreement provisions, and that all of the documents were subject to the access legislation anyway. When this decision was taken to judicial review, the Québec Court ruled that the Commissioner did have jurisdiction and on May 15, 2002 upheld the Commission's decision.

Standing of Parties in Access to Information Cases

Centre québecois du droit de l'environnement c. Québec (Ministère de l'environnement)

No. 500-09-002413-961 Cour d'Appel, Province de Québec, Greffe de Montréal *appealed from* [1996] A.Q. no 684

A request was made to the Ministère de l'environnement for reports on the condition of subterranean water and soil on property owned by a company called Goodfellow Inc. Initially, the requester was granted permission to view some of the information, but Goodfellow Inc. appealed for judicial review of this decision. During the court proceedings, the Centre québecois du droit de l'environnement, a non-profit organization, obtained status as an intervenor and provided testimony in support of the requester's position. When Goodfellow Inc. won the court case and was allowed to withhold the reports, the Centre, though not a direct party to the case, asked for leave to appeal the decision. Both the Superior Court of Québec, and in November 2001 the Québec Court of Appeal, refused to grant this leave to the Centre, opining that the Centre did not have standing to bring this appeal under the legislation.

Fee Charges / Frivolous Requests

Curateur public du Québec c. Cécile Boeck

No. 500-02-091523-014 Cour du Québec, District de Montréal, Chambre civile

A requester seeking documents from the Curateur public du Québec was quoted a charge of $109.98 for fulfillment of the request. The reason for the charge was that other people linked to her had been asking for different pages of the same documents, in an apparent attempt to circumvent the rules regarding the length of search time after which fees can be imposed. The Commission found that there was no evidence that this request was frivolous or made in bad faith, and ordered that the fee charge be rescinded. The decision was appealed to court, where on May 3, 2002, it was found that the Commission had erred in applying the legislative provisions regarding frivolous requests to the issue of fees, since the issue here was whether or not the automatic fee limits were applicable. The court ordered the requester to either pay the fees quoted or alternately to exercise her right of viewing the requested documents for free on the premises of the Curateur without receiving her own copy.

Recommendations

The Commission testified at public hearings held on proposed amendments to the *Act respecting the Régie du logement and the Civil Code* in November 2001. The Commission had already released public information guidelines for the exchange of personal information between landlords and tenants in early 2001. In its November submission, it emphasized that landlords must not collect any more personal information from prospective tenants than is required to verify their ability to pay, and that they must destroy whatever information they receive once it is no longer needed. The Commission suggested it has the statutory powers to award punitive damages in cases of breach.

Following the conclusion of the hearings, the Minister of Municipal Affairs and the Metropolis announced that she would be supervising the collection of personal information for rental housing more closely. The Commission released a statement supporting her position.

Papers and Submissions

Strategic Plan

The Commission released its 2001-2003 strategic plan in March 2001. The aims in this plan include:

- reducing delays in the processing of applications to the Commission
- playing a more active role in monitoring new technologies and their effects on access and privacy issues

- conducting an overhaul of the existing access régime and recommending improvements, as part of the legislative obligation to produce a report on the act every five years

The strategic plan also stated that in order to complete the vision outlined in the document, the Commission would require a greater commitment of resources.

Biometrics Guidelines

In July 2002, the Commission released a paper on biometrics for the use of businesses, government departments and agencies in Québec. The paper described how biometrics work, what they are used for and their implications for privacy, as well as suggesting principles for institutions to follow in applying this technology.

Newfoundland

Legislative Developments

Public Sector

The Newfoundland House of Assembly passed the *Access to Information and Protection of Privacy Act*, on March 14, 2002, although it has yet to be proclaimed. The new *Act* will replace the province's old *Freedom of Information Act*, which was originally passed in 1981, with legislation that is much broader in scope. The new *Act* marks the introduction of a new privacy regime in Newfoundland. It also puts a formerly-discontinued independent review mechanism back in place for access, and extends it to privacy as well.

The new *Act* will apply to public bodies, including government departments, Crown corporations and local government. It will be proclaimed in stages, with the access provisions likely to come into effect in the fall of 2002, and the privacy provisions following during either the spring or the fall of 2003. Municipalities will come under the *Act* at a later date.

The oversight officer for the new *Act* will be the Citizens' Representative of Newfoundland and Labrador, an ombudsman-like impartial officer of the legislature. He will have the power to conduct investigations and compel production of documents, but will make recommendations rather than issuing orders. The new Citizens' Representative, Fraser March, was appointed on February 1, 2002, following the 2001 passage of a separate Act creating his position and its multiple responsibilities. His office opened for business on March 1, 2002, and some investigative staff may be hired in the future to assist with the access and privacy portion of his portfolio.

The province's Department of Justice will be responsible for administering the new *Act*. The Department is currently developing regulations for the fall 2002 proclamation deadline and educating government ministries about their compliance duties.

Other

Invasion of privacy continues to be a tort in the province under the 1990 *Privacy Act*, which is unaffected by the new legislation. There are no plans at this stage to develop access and privacy legislation governing the private sector in Newfoundland, so this sector will come under the jurisdiction of the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* as of 2004.

External Factors

In August 2002, the Citizens' Representative issued a public appeal to the government for more resources for his office. He has already received 450 complaints to investigate since it opened, and has not yet taken on his access and privacy duties, which he expects will double his workload.[4]

[4] "Nfld. Official Wants Staff to Help Cope with Freedom of Information Duties". *Canadian Press Wire*. August 19, 2002.

New Brunswick

Legislative Developments

Public Sector

New Brunswick's *Protection of Personal Information Act*, originally passed by the legislative assembly in 1998, was proclaimed on April 1, 2001. A short guide to the *Act* in brochure form was made available to the public by the Department of Justice and the Department of Supply and Services in February 2001, outlining its basic principles. The *Act* applies to government departments and public bodies.

Access to information held by these institutions is governed by a separate act, the *Right to Information Act*, which came into force in 1980. The Office of the Ombudsman has oversight over both these acts, although under the *Right to Information Act*, a requester may choose to appeal a public body's decision directly to the courts instead of going through the Ombudsman.

Private Sector

There are no plans at this stage to develop privacy legislation governing the private sector in New Brunswick. If no provincial legislation is passed, the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* will apply in New Brunswick as of 2004.

Significant Inquiries

The Ombudsman's office has conducted one inquiry under the *Protection of Personal Information Act* in the year since its proclamation, into a complaint that proved to be unfounded. It also conducted six inquiries under the *Right to Information Act* in the past year. Three of these were successfully mediated, and three upheld the decision of the public body in question to withhold requested information. No major precedent-setting recommendations were made in any of these cases.

Court Decisions

Seguin v. New Brunswick (Minister of Investment and Exports)

2001 NBCA 111

This case involved an access request made under the *Right to Information Act* by a television reporter. He requested documents pertaining to the approval of a government loan for the development of the Royal Oaks Golf Club in Moncton. The Ministry of Investment and Exports released the order-in-council that authorized the loan but did not release any further information on the grounds that it was provided in confidence by a third party and could potentially do harm to that party's economic interests. This decision was appealed directly to court, whereupon the owners of the golf club applied for intervenor status. Their application went to the New Brunswick Court of Appeal, which ruled that they could indeed apply for this status as parties that might be affected by the outcome. The case is currently proceeding.

Powers and Procedures

The Ombudsman's office is often the first line of inquiry if citizens want to obtain personal information about themselves held by the government. Prior to the *Protection of Personal Information Act*, the Ombudsman's office conducted investigations with respect to personal information under the *Ombudsman Act*. Since the proclamation of the new *Act*, the public body conducts an internal investigation instead, and the Ombudsman's office acts as an appeal and oversight mechanism for the public body's decision. The Ombudsman's office is continuing to act as a source of information for general inquiries about the new *Act*.

Reports

Between the period of September 2001 to August 2002, the Office of the Ombudsman released the 1999-2000 annual report and the 2000-2001 annual report.

External Factors

In addition to the privacy and access acts, the Ombudsman's office also has responsibility for conducting investigations into complaints under the *Ombudsman Act*, the *Civil Service Act* and the *Archives Act*. The staff complement for the Ombudsman's office is currently nine people, including the Ombudsman, Ellen King. While there has been some strain on resources in the office, the coming into force of the *Protection of Personal Information Act* has decreased the overall workload by restricting the Ombudsman's role in privacy cases to that of an oversight mechanism only.

Nova Scotia

Legislative Developments

Public Sector

The provincial *Freedom of Information and Protection of Privacy Act* was amended retroactive to April 4, 2002 to bring fee increases into effect. The fee for an application was raised from $5 to $25, the review fee from nothing to $25, and search time fees from $20/hr to $30/hr. The traditional first free two hours of search time were eliminated, but there will continue to be no charge for producing personal information only.

The Review Officer, Darce Fardy, who has oversight of the *Act*, publicly voiced his opposition to the fee increases at public hearings held by the Law Amendments Committee in May 2002. He indicated that, while he supports a modest fee for access, he feels fee increases of this scale will act as a deterrent to would-be requesters. (For further developments, see ***External Factors***.)

Private Sector

There are no plans at this stage to develop privacy legislation governing the private sector in Nova Scotia. If no provincial legislation is passed, the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* will apply in Nova Scotia as of 2004.

Significant Reviews

Fees for Access

Report FI-01-04

The University of Acadia decided to charge $400 for a booklet containing employee salary information and told a requester that it had thus discharged its duty to make the information available. The Review Officer declared otherwise, citing the access fees in the *Act* as the proper cost of obtaining the information. The University agreed to consider the Review Officer's recommendations for bringing the cost in line with the *Act*.

Report FI-01-102

The Town of Springhill's Police Chief was suspended, and an individual sought access to the internal discipline investigation report that led to the suspension. The Nova Scotia Police Commission cited the third party privacy exemption in its refusal. The Review Officer checked with the third parties mentioned in the report, and discovered that only two of them objected to the release of the information, the acting police chief and a board member of the Springhill Board of Police

Commissioners. He concluded that the information in the report could still be disclosed under the *Act*, since it related to the two objectors' position and function as employees of a public body (s. 20(4)(e)), and that furthermore, release of the investigation report was in the public interest.

Privacy Rights After Death

Report FI-01-81

The Department of Health refused to release a copy of a 911 call related to a murder-suicide to a requesting journalist. The Review Officer upheld the refusal on the grounds that the deceased have privacy rights, and the public interest in this situation was not sufficiently compelling to warrant overriding those rights.

Background Information and the Cabinet Confidentiality Exemption

Report FI-01-68

The Department of Finance provided a requester with some documents analyzing the fiscal benefits of the offshore oil industry, but they were severed to exclude information that was considered to fall under the "advice" exemption and the "harm to negotiations of a public body" exemption. The Review Officer found that the department had used its discretion to withhold not only information of this nature (which is acceptable under the *Act*), but also to withhold "background information" (such as economic forecasts) used in coming to a decision. This type of background information is required to be released under s. 14(2) of the *Act*. The Department partially accepted some of the Review Officer's recommendations for further disclosure.

Harm to Financial Interests

Report FI-01-30

Dalhousie University was asked for documents about the general academic performance of first year students, including one that compared students' high school marks with their subsequent performance at the University. The University claimed the release of such information would harm its financial or economic interests, and was therefore exempt from release. The Review Officer found that insufficient proof had been advanced to support this argument, but the University continued to refuse disclosure.

Report FI-02-06

The Department of Health refused access to records about an application for drug approval from a pharmaceutical company connected to a process being put in place to determine interchangeability of pharmaceutical products for sale in the province. The Department claimed both the third party information and protection of economic and financial interest exemptions, saying that the disclosure

of the information was given on condition of confidentiality and would harm the company's competitive position if released. The Department further argued that this type of disclosure would diminish generic drug companies' interests in doing business in Nova Scotia. The Review Officer noted, with some reservations, that the argument was valid and upheld the refusal to give access.

Report FI-02-21

An applicant seeking information about royalty forecasts for the Sable Offshore Energy Project received some actual and forecasted revenue documents, but was refused access to particular data on annual projected royalty payments to the year 2030. The Petroleum Directorate argued for a Cabinet confidentiality exemption, as well as the economic and financial harm exemption, and asserted that the information had been provided to them in the expectation of confidentiality. The Review Officer accepted only the economic and financial harm argument, noting that disclosure of the information could damage the Directorate's negotiating position with respect to the Project.

Retention of Documents Containing Personal Information

Report FI-02-23

The applicant asked the University College of Cape Breton for the records relating to an Ethics Committee charge against a student in 2001 that was later withdrawn. He was told that no such records existed because they had been destroyed after the withdrawal of the charge. The Review Officer found that the University College was not in compliance with s. 24(4) of the *Act* requiring retention of documents containing personal information about an individual for at least one year following their use.

Solicitor-Client Privilege

Report FI-02-58

The Department of Justice responded to a request to release information about the decision to raise access request fees in the province, but severed some of the documents on the basis of Cabinet confidentiality concerns and solicitor-client privilege. The Review Officer went through the individual severed items and found in favour of releasing most of them. He recommended that the government exercise its discretion to release some of the documents for which it had claimed solicitor-client privilege, indicating that the routine use of such a privilege for less important documents "devalues the privilege that is important to uphold."

Court Decisions

Background Information and the Cabinet Confidentiality Exemption

O'Connor v. Nova Scotia
[2001] NSCA #132

The Planning and Priorities Secretariat undertook a review of existing provincial government programs and eliminated 86 of them. The Appellant requested information about this process, and some information was released, both before and after the Review Officer's recommendations. However, there still remained information that was not released, and the Secretariat claimed the exemption for Cabinet confidentiality.

The lower court and the Court of Appeal both found that this information constituted background information on decisions that had already been taken, not live input into the Cabinet decisions themselves, and therefore could be released. (Information relating to the review of an additional 1,000 programs that had not yet been evaluated did not have to be released, however.) The Secretariat sought leave to appeal to the Supreme Court of Canada, and it was refused on June 13, 2002. As a result, only substantive information about Cabinet decisions is now subject to the Cabinet exemption, not background information.

Third Party Information and Peer Reviews/Investigations

Keating v. Nova Scotia (Attorney General)
[2001] NSSC 85 (S.C.)

The Department of Justice refused to release information about a provincial government program to compensate alleged victims of institutional abuse to an appellant who knew allegations of abuse had been made against him. The Department continued its refusal even when the Review Officer recommended disclosure, and there was an appeal. While the court found that much of the information was personal information, it also found that the complainants had previously consented to the disclosure of that information by signing release forms authorizing various uses for it. The Court directed that the information be released to the appellant.

French v. Dalhousie University
[2002] NSSC 022

An applicant who had been a department head at Dalhousie University sought access to the documentation of his "peer review", where fellow faculty members gave their opinions of his work as part of an internal survey. The University refused to provide them, citing the third party privacy exemption. The Review Officer found that the opinions and evaluations about the applicant in the document were in fact the applicant's own personal information, and he was therefore entitled to them. He added that the names of any third parties could be severed to protect their privacy. The

University continued to refuse disclosure. The matter was appealed to the Nova Scotia Supreme Court, which upheld the Review Officer's recommendation that the documents be released, with portions containing identifiable information about the source of the opinions severed. This ruling is now on appeal to the Nova Scotia Court of Appeal.

Recommendations

In his 2000-01 annual report, the Review Officer recommended that the *Act* be amended to give his office the power to investigate and report on privacy complaints, and to give him the explicit ability to delegate review of some documents to his staff (and administer confidentiality oaths to them). This last recommendation was in response to a situation where a public body challenged the right of anyone but the Review Officer to handle certain documents.

External Factors

In August 2002, information was released indicating that the number of freedom-of-information requests filed in Nova Scotia had dropped by half in the five months following the access fee increase. The government praised these figures as indicating an increase in efficiency, with the province's Justice Minister stating: "Clearly some people have made a decision that certain kinds of information aren't important, or they may have made a decision to pick the information they want more carefully than they have in the past."[5] In response, the province's opposition party, the New Democrats, has launched a legal challenge against the government. The suit is centered on the government's refusal to hand over documents which the New Democrats claim show the government deliberately increased access fees to stop "embarrassing" stories that were being generated as a result of access requests.[6]

[5] Nova Scotia Justice Minister Michael Baker as quoted in: Brewster, Murray. "Nova Scotia Information Fee Increases Translate Into Fewer Requests". *Canadian Press Wire*. August 18, 2002.

[6] "New Democrats Take Government to Court Over Freedom of Information Laws". *Canadian Press Wire*. August 19, 2002.

Prince Edward Island (PEI)

Legislative Developments

Public Sector

The province of Prince Edward Island now has access and privacy legislation for the first time in its history. Bill No. 47, the *Freedom of Information and Protection of Privacy Act (No. 2)*, was given first reading in the Legislative Assembly on April 24, 2001, and received royal assent May 15, 2001. The *Act* will be proclaimed in November 2002 and will come into effect for all departments, agencies, boards and commissions of government ("public bodies"). School boards and health agencies will come under the new *Act* one year later.

Bill No. 32, *An Act to Amend the Freedom of Information and Protection of Privacy Act (No. 2)*, was given first reading on April 30, 2002, and received royal assent on May 10, 2002. The amendments will be proclaimed at the same time as the *Act*. They removed "No. 2" from the title of the *Act* and introduced some "housekeeping" changes, in particular more detailed language for some of the definitions and provisions.

The amendments also included a few major alterations to the original content of the *Act*, such as:

- Language allowing the Minister to designate who heads the public bodies covered under the *Act*.
- The reduction of the waiting time period for disclosure of archival materials to 25 years under certain conditions (although the 75-year period in the original *Act* stands if those conditions are not met).
- The selection of 20 years as the time that must elapse before more sensitive items such as Cabinet documents must be released. (This change was intended to make the time period governing various kinds of documents consistent throughout the *Act*.)
- The inclusion of "background facts" (along with "advice from officials") as Cabinet material, which therefore cannot be released before the end of the 20-year period.

This last amendment was drafted in the wake of a protracted court case in Nova Scotia centering on the definition of "background facts" and how to sever them from Cabinet documents. This case influenced PEI to follow the approach of several other provinces that have opted to automatically deem background facts as part of Cabinet material in order to avoid ambiguity in the legislation.

A seven-person transition team headed by a General Manager, Leonard Cusack, has been set up in the provincial government's Executive Council office to initiate implementation of the *Act* until such time as the *Act* is proclaimed and an Information and Privacy Commissioner is appointed. The Commissioner will have order-making powers, as well as the ability to conduct investigations and

compel production of documents. The position is expected to start as a part-time one, subject to developments with workload.

The Executive Council will continue to administer the Act until it is proclaimed, and its implementation team is currently working on the regulations, including a fee schedule and a complete list of public bodies subject to the *Act*. It will have a 2-year period following the proclamation to determine what sections, if any, of other provincial legislation will have paramountcy over the *Act*, with input from the Commissioner.

Private Sector

The decision as to whether the province will develop its own private sector access and privacy legislation before the 2004 deadline for coming under the jurisdiction of the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* has not yet been made.

Nunavut Territory

Legislative Developments

Public Sector

There were no amendments to the *Access to Information and Protection of Privacy Act* during this time period.

Private Sector

The position of the federal Privacy Commissioner's office is that the territories hold the constitutional status of a "federal undertaking" and that the private sector in all three territories therefore became subject to the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* as of January 1, 2001. This would also mean that *PIPEDA* covers personal health information held by organizations in the territories as of January 1, 2002.

The territorial government disagrees with this position, and the territorial Information and Privacy Commissioner has recommended that the Nunavut Legislative Assembly introduce its own legislation to cover the private sector (see ***Recommendations*** below).

Significant Reviews

Third Party Commercial Information

Review Decision 01-02

An applicant was refused access to the competing proposals for a community dental clinic and the scoring cards used to evaluate the proposals by the Ministry of Health and Social Services. The Ministry refused on the grounds that the proposals were submitted to the Ministry by third parties in expectation of confidentiality, and that each party had been given an assurance that the scoring of the proposals would remain confidential before making their submissions. The Commissioner found that while the proposals constituted commercial information that had been implicitly submitted in confidence and were therefore required to be withheld, the scorecards for the proposals were not entitled to such an exemption. She recommended they be released.

Release of Opinions Given by Employment References

Review Decision 02-03

A former employee of the Department of Human Resources requested all information in her personnel file. She was given most of the documents, with the exception of records of the reference checks that had been done on her by the Department. The Department asserted that this information was personal information provided in confidence by a third party for evaluative purposes related to employment and was therefore exempt under the *Act*. The Commissioner found that the *Act* was correctly invoked in this case, but since the Department has discretion under the *Act* to decide whether or not to release this type of information, she recommended that the third parties be given notice as to its possible release, and that the Department base its exercise of the discretion on whether or not the third parties object to the release.

Recommendations

The Standing Committee on Government Operations and Services tabled its review of the 2000-2001 annual report of the Information and Privacy Commissioner on February 25, 2002. The Commissioner, Elaine Keenan Bengts, reported that the number of requests she is receiving for reviews of decisions made by public bodies is increasing. She made several recommendations:

- The Nunavut government should designate access/privacy co-ordinators for each department and publish a directory of them.
- The *Act* should be amended to introduce a "deemed acceptance" of the Commissioner's recommendations after a 30-day period unless the public body issues another response.
- The *Act* should be amended to allow the Commissioner to investigate privacy complaints.
- The *Act* should be amended to give the Commissioner the power to subpoena documents and witnesses.
- Municipalities should be subject to the *Act*.
- The list of entities that fall under the *Act* should be updated and revised to reflect organizational changes in the government.
- The government should introduce legislation in response to the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)*, which will otherwise govern Nunavut's private sector
- The government should publish annual statistics on the number of requests made to public bodies for access to information
- The government should ensure the Commissioner is formally consulted before legislation is amended or newly developed

- The government should update the legislative assembly on progress made in reviewing the statutes of Nunavut (which are all temporarily adopted from the statutes of the neighbouring Northwest Territories, of which Nunavut used to be a part, for the time being)

The Standing Committee endorsed all of the above recommendations, although in the case of the municipalities it recommended only that they be consulted about whether they should be subject to the Act. The Committee also made further recommendations of its own:

- The government should annually release to the public a list of government tenders and RFP results, along with comprehensive information about who they went to, the value of all bids received, and other pertinent details.
- The Commissioner should be more "proactive" in visiting Nunavut communities and providing public education on access and privacy issues, and that her activities and expenditures in this regard be included in her annual report.
- The government should indicate whether it intends to develop legislation specifically on the protection of personal health information.
- The government and the Commissioner should work together to implement a longstanding recommendation that Community Justice Committees be properly trained in the management of confidential personal information.

Northwest Territories (NWT)

Legislative Developments

Public Sector

There were no amendments to the *Access to Information and Protection of Privacy Act* during this time period.

Private Sector

The position of the federal Privacy Commissioner's office is that the territories hold the constitutional status of a "federal undertaking" and that the private sector in all three territories therefore became subject to the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* as of January 1, 2001. This would also mean that *PIPEDA* covers personal health information held by organizations in the territories as of January 1, 2002.

The territorial government disagrees with this position, and the territorial Information and Privacy Commissioner has recommended that the Northwest Territories introduce its own legislation to cover the private sector (see ***Recommendations*** below).

Significant Reviews

Disclosure of Bulk Electronic Information for Law Enforcement Purposes

Review Decision 02-23

The City of Yellowknife had a longstanding practice of downloading motor vehicle information in bulk from a database of the provincial Department of Transport for the purpose of enforcing the *Motor Vehicles Act* and the city's highway traffic by-law. The Department had begun to refuse the City full roaming access to the database and its functions, and had substituted a case-by-case "query" function for law enforcement officers to use instead, on the basis of needing to protect the privacy and integrity of the personal information contained in the database. The City argued that its access had never been abused in the past, that the new method was time-consuming and less efficient, and that its use of the information came under the exemption for law enforcement activities.

The Commissioner noted that while the City's use would normally fall under a law enforcement exemption, the City, like other NWT municipalities, does not come under the provincial access and privacy legislation. She also concluded that the City had not sufficiently demonstrated that it needed random access to the entire database in order to fulfill its law enforcement duties. She concluded that the Department was therefore correct to limit the City's access to the information. The Commissioner

recommended that any government body contemplating bulk disclosure of personal information to any municipal law enforcement agency impose a contractual obligation for it to be protected.

A jurisdictional issue also arose in this case. The Department questioned the Commissioner's jurisdiction to conduct a review on the grounds that it was providing the City with the full amount of information it was required to under the *Motor Vehicles Act* and the Commissioner is not in a position to interpret that *Act*. The Commissioner found that she did have jurisdiction, since the provincial *Access to Information and Protection of Privacy Act* contains a clause giving it paramountcy over all other legislation unless specifically stated.

Recommendations

The legislative assembly's Standing Committee on Accountability and Oversight tabled its review of the Information and Privacy Commissioner's 2000-2001 annual report on June 13, 2002. The NWT Commissioner is the same person who holds the office in Nunavut, Elaine Keenan Bengts, and she made similar recommendations to the ones laid out in the Nunavut annual report.

Her recommendation that government departments be deemed to have accepted the Commissioner's recommendations after 30 days' non-response was not supported by the Committee. It recommended that this time gap should be deemed a *refusal* of the recommendations instead. The government has agreed with the Committee and is drafting an amendment clause for the *Act* to this effect.

The Committee supported the Commissioner's recommendations that municipalities be either included in the *Act* or receive their own *Act*, but is awaiting an additional opinion from the Department of Justice. It also supported the Commissioner's recommendation that NWT draft its own legislation in order to prevent its private sector becoming subject to the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)*, which would be overseen by the federal Privacy Commissioner.

In addition, the Committee supported the recommendation that NWT introduce separate legislation to protect health-related personal information, and also suggested, as an alternate measure, amending the current Act to include this type of information.

Yukon Territory

Legislative Developments

Public Sector

Bill No. 60, an Act to amend the *Access to Information and Protection of Privacy Act*, was passed and assented to on May 30, 2002. It substituted the term and definition of "records manager" for that of "archivist" in the *Act*.

Private Sector

The federal Privacy Commissioner's position is that Canadian territories are "federal undertakings" under constitutional law, and therefore the federal *Protection of Personal Information and Electronic Documents Act (PIPEDA)* came into force for Yukon Territory's private sector as of January 1, 2001, and was extended to explicitly cover personal health information held by organizations in this sector as of January 1, 2002.

Significant Recommendations

The Yukon Information and Privacy Commissioner, Hank Moorlag, has oversight responsibility for the territory's *Access to Information and Protection of Privacy Act*. (The Commissioner also holds the dual role of Yukon Ombudsman.) He made several findings during this time period:

- The Commissioner found that an offer of employment does not fall under the description of a "public servant's position, function or salary range" and therefore is personal information to which a public body is required to refuse access.
- The Commissioner ended his inquiry into the non-response of a public body to an access request once the body did respond, concluding that the public body's response, even if late, ended his own authority to deal with the matter.
- A public body applied to the Commissioner for permission to disregard a request, and included some personal information in this application. After an inquiry into whether this disclosure of personal information was proper, the Commissioner concluded that a public body can use personal information contained in an access request in such an application, but may not use other personal information in its custody or control, or that was acquired from any other central agency.
- The proceedings of the Human Rights Commission, including an investigator's interview with officials, were considered to fall under the definition of "law enforcement." Furthermore, the Commissioner agreed with the Alberta position that a "may" exception is a two-step process of:

1) A determination of whether an exception applies (the factual decision);

2) A decision as to whether the information should nevertheless be disclosed, even though the exception applies (the discretionary decision).[7]

- The Commissioner endorsed Ontario's position that if there is a reasonable expectation that an individual can be identified from the information in a record then such information does qualify as personal information.
- Disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy under the Yukon *Act* if the information was compiled as a part of investigation about a possible violation of law or a legal obligation. The Commissioner found that third party personal information collected in the course of an investigation under the Workplace Harassment Policy is covered by this exception. However, all other records created in the course of a workplace investigation enjoy no special protection and can only be addressed on an exception-by-exception basis, even where third party information is involved.
- The *Act* contains an exception whereby a public body must refuse to disclose information that would be harmful to the business interests of a third party. The Commissioner found that in order for the exception to apply, this financial information must belong to the third party.
- The Commissioner concluded that an applicant for access to records may remain anonymous if there are no objections from the other parties involved.

Investigations

The Commissioner conducted an investigation into a public body's response after inquiry and found maladministration by the public body. At inquiry, the Commissioner recommended that the record in question be released with the personal information in it severed, but the public body then claimed it no longer had the record.

Court Decisions

Yukon Medical Council v. Yukon (Information and Privacy Commissioner)

2002 YKSC 14

During an inquiry held in 2000, the Yukon Medical Council took the position that it is not subject to the *Act*, nor does the *Act* apply to the records in its custody or control, because it is not a public body as defined in section 3 of the *Act*. The Commissioner decided that the Council is such a public

[7] Vincent, Michele. "Review of the Jurisdiction and Exceptions under the Freedom of Information & Protection of Privacy Act" . *Canadian Journal of Administrative Law and Practises*. Volume 12, No. 3. 1999.

body. The Council applied to the Yukon Supreme Court for an order of certiorari quashing the Commissioner's decision and a declaration that it is not a public body subject to the *Act*. The Court upheld the Commissioner's decision and dismissed the application. The Council appealed this decision to the Yukon Court of Appeal, which decided that the *Medical Profession Act* conferred powers on the Council which it was intended to exercise free from government control, to such an extent that it must properly be regarded as an independent body, and not a public body subject to the jurisdiction of the Commissioner.

The Commissioner has recommended to the Yukon government that the legislation be amended to include a list of public bodies subject to the *Act*. To date the government has not acted on this recommendation, and decisions about which bodies are subject to the *Act* are made on a case-by-case basis.

External Factors

Changes in Government

While a review of Yukon's *Act* had been pending under the department which formerly administered it, the Department of Education, responsibility for the *Act* was transferred to the Department of Infrastructure in 2002. Since then, there has been no activity in preparation for a review.

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